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PLAINTIFFS' EXHIBITS.

Summons.

(Filed May 25, 1928.)

THE STATE OF NEW JERSEY TO JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation. You are summoned to answer the annexed complaint of Herbert Migatz and Loretta Migatz in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

(SEAL)

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this twenty-second day of May, Nineteen Hundred and Twenty-eight.

FRED L. BLOODGOOD,
Clerk.

RASKIN, HORNSTEIN & RUSKIN,
Attorneys.

Notice to the within named Defendant:

In case the within Summons and Complaint are served upon you personally, then take notice that if you intend to make a defense to said action, you must file an Affidavit of Merits within TEN DAYS from the date of service thereof upon you, and must file your Answer within TWENTY DAYS from the date of such service, and in default of the filing thereof, judgment will be entered against you.

RASKIN, HORNSTEIN & RUSKIN,
Attorneys of Plaintiffs.

Complaint.

(Filed May 25, 1928.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation, *Defendant.*	ACTION AT LAW.

Plaintiffs, Herbert Migatz and Loretta Migatz, his wife, residing in the City of Newark, in the County of Essex and State of New Jersey, complain of the defendant and say:

1. On or about March 27, 1927, in the City of Newark, in the County of Essex and State of New Jersey, they were injured by a Shaw Yellow Taxicab, bearing New Jersey license for the year 1927, #O-1982-T, Engine #563V41252, the property of one Arthur Bennett, doing business as Globe Taxi Company.

2. That on May 19th, 1927, a suit at law for damage for said injuries was filed in the New Jersey Supreme Court, Essex County Circuit, by the plaintiffs herein against the said Arthur Bennett, doing business as Globe Taxi Company. Subsequent proceedings were had therein with the result that a general verdict of $2,000.00 was entered in favor of the plaintiff, Herbert Migatz, and $8,000.00 in favor of the plaintiff, Loretta

Migatz, and against Arthur Bennett, doing business as Globe Taxi Company, the defendant in that action.

3. Subsequently, and on December 13th, 1927, a judgment was entered in the New Jersey Supreme Court in favor of the plaintiff, Herbert Migatz, for $2,000.00, and in favor of the plaintiff, Loretta Migatz, for $8,000.00, and for the sum of $75.46 costs of suit, and against the defendant, Arthur Bennett, doing business as Globe Taxi Company.

4. On December 13th, 1927, plaintiffs caused to be issued on said judgment a writ of fieri facias de bonis et terris directed to the Sheriff of Essex County, which having been duly recorded, was delivered to the Sheriff to be executed, but the said Sheriff has since duly returned said writ with a return as follows: "All assets of the estate of Arthur Bennett, deceased, in hands of Thomas A. Davis, Jr., Administrator; amount unknown. Dated—December 22nd, 1927".

5. The said Thomas A. Davis, Jr., has since informed the plaintiffs that the estate of the said Arthur Bennett is insolvent and unable to meet current obligations and that the liabilities exceeded the assets, and had from the date of the said judgment in which the said Arthur Bennett was defendant and the plaintiffs herein were plaintiffs.

6. On or about January 1st, 1927, the said Arthur Bennett, doing business as Globe Taxi Company, entered into a contract with the Jersey Mutual Casualty Insurance Company, the defendant herein, whereby said Company, for a valua-

ble consideration, which was duly paid, agreed to indemnify said Arthur Bennett, doing business as Globe Taxi Company, for any loss and other expenses not exceeding $5,000.00 for injuries or death of one person arising or resulting from claims upon the said Arthur Bennett, doing business as Globe Taxi Company, and $10,000.00 for injuries or death of two persons arising or resulting from claims upon the said Arthur Bennett, doing business as Globe Taxi Company, on account of bodily injuries and/or death accidently suffered or alleged to have been suffered by any person or persons, by reason of the ownership, maintenance, and/or use of a certain Shaw Taxicab hereinbefore mentioned.

7. Said agreement to indemnify the said Arthur Bennett, doing business as Globe Taxi Company, was in effect on March 27th, 1927, and continued in effect to the date of the institution of suit by the plaintiffs against the said Arthur Bennett on May 19th, 1927.

8. In said agreement it was further provided that the death, bankruptcy or insolvency of the said Arthur Bennett, doing business as Globe Taxi Company, should not relieve the Jersey Mutual Casualty Insurance Company from the payment of such indemnity as would have been payable but for such death, bankruptcy or insolvency, and if, because of such death, bankruptcy or insolvency an execution on a judgment for damages against Arthur Bennett, doing business as Globe Taxi Company, was returned unsatisfied in an action brought by the injured person, or his or her representative, where death results from the accident, an action might be maintained

by the injured person, or his or her representative against the Jersey Mutual Casualty Insurance Company for the amount of such judgment not exceeding the amount of the policy limit of $5,000.00 for one person and $10,000.00 for two persons.

9. Arthur Bennett, doing business as the Globe Taxi Company, died September 9th, 1927, insolvent, and by reason of his insolvency an execution on the judgment obtained against him by the plaintiffs as heretofore set out was and is uncollectable and is wholly unsatisfied. Neither said Arthur Bennett nor his estate has paid anything on account of said judgment, and there is due and owing to the plaintiffs thereon the sum of $10,075.46 with interest from December 13th, 1927.

Plaintiffs demand as damages the sum of Fifteen Thousand ($15,000) Dollars.

RASKIN, HORNSTEIN & RUSKIN,
Attorneys of Plaintiffs.

Answer.

(Filed June 15, 1928.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,*

vs.

JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation, *Defendant.*

ACTION AT LAW.

Defendant answering the Complaint filed by the plaintiffs in the above entitled matter, says that:

1. Defendant has not sufficient knowledge or information to form a belief as to the allegations contained in Paragraph One, but leaves the plaintiffs to their proof thereof.

2. Defendant has not sufficient knowledge or information to form a belief as to the allegations contained in Paragraph Two, but leaves the plaintiffs to their proof thereof.

3. Defendant has not sufficient knowledge or information to form a belief as to the allegations contained in Paragraph Three, but leaves the plaintiffs to their proof thereof.

4. Defendant has not sufficient knowledge or information to form a belief as to the allegations contained in Paragraph Four, but leaves the plaintiffs to their proof thereof.

Answer.

5. Defendant has not sufficient knowledge or information to form a belief as to the allegations contained in Paragraph Five, but leaves the plaintiffs to their proof thereof.

6. Defendant denies the allegations contained in Paragraph Six.

7. Defendant denies the allegations contained in Paragraph Seven.

8. Defendant denies the allegations contained in Paragraph Eight.

9. Defendant has not sufficient knowledge or information to form a belief as to the allegations contained in Paragraph Nine, but leaves the plaintiffs to their proof thereof.

First Separate Defense.

The said policy of insurance issued by the defendant to the decedent, Bennett, was not in force or effect at the time the accident occurred or at the time it is alleged judgment was entered on behalf of the plaintiffs.

Second Separate Defense.

Decedent failed and neglected to give any notice or knowledge to defendant of this alleged occurrence and in other particulars failed and neglected to comply with the terms of the said policy.

George F. Seymour, Jr.,
Attorney for Defendant.

Reply.

(Filed June 19, 1928.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation, *Defendant.*	ACTION AT LAW.

Plaintiffs deny each and every allegation contained in the answer of the defendant, including the first and second separate defenses, and join issue thereon.

RASKIN, HORNSTEIN & RUSKIN,
Attorneys of Plaintiffs.

Case.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

January 13, 1930.

HERBERT MIGATZ and LORETTA MIGATZ, *vs* JERSEY MUTUAL CASUALTY INSURANCE COMPANY.	ACTION AT LAW.

Before Hon. WORRALL F. MOUNTAIN, *J.*, and a jury.

For the plaintiffs appear RASKIN, HORNSTEIN and RUSKIN (by ISIDORE HORNSTEIN).

For the defendant appears GEORGE F. SEYMOUR, JR.

(A jury is called and sworn.)

Mr. Hornstein opens for plaintiffs.

Mr. Seymour opens for defendant.

Mr. Hornstein: I respectfully ask for a direction on counsel's opening. I have here a transcript of judgment to which there has been a judicial decision by the Supreme Court of this state that this accident was with the car of Bennett.

The Court: When you ask for a direction you say the case is closed. You haven't anything put in evidence as yet. You had better be careful or some day you will be in a bad position.

Mr. Hornstein: I offer now a certified copy of the transcript of the pleadings of the case of Her-

bert Migatz versus Arthur Bennett doing business as the Globe Taxicab Company and Carroll D. Henderson.

Mr. Seymour: No objection.

(The same is received in evidence and marked Exhibit P1.)

Mr. Hornstein: I offer in evidence a certified copy of an execution issued out of the Supreme Court in the case of Herbert Migatz versus Thomas A. Davis, Administrator of the estate of Arthur Bennett, deceased, and the return of the Sheriff of Hudson County wholly unsatisfied.

Mr. Seymour: No objection.

(The same is received in evidence and marked Exhibit P2.)

The Court: This was returned unsatisfied?

Mr. Hornstein: Yes, your Honor. With the Court's permission I would like to read into the record the answer to certain interrogatories in this case:

"State whether a policy was issued by the defendant Jersey Mutual Casualty Insurance Company, Inc. to Arthur Bennett doing business as the Globe Taxi Company insuring his Shaw taxicab bearing New Jersey license for the year 1927 number 01982-T, engine number 563V41252? A. Yes."

"Was said policy of insurance in force on or about March 27, 1927? A. Yes."

"If your answer to foregoing interrogatories is in the negative when was liability in said policy determined? A. See answer to number two."

"What were conditions which brought about the termination of liability in said policy? A. Liability not yet determined."

Mr. Hornstein: I offer the interrogatories in evidence as well as the answers.

(Interrogatories are received in evidence and marked Exhibit P3.)

(Answers to interrogatories are received in evidence and marked Exhibit P4.)

Mr. Hornstein: I offer in evidence a certified copy of certificate issued by the Commissioner of Motor Vehicles certifying that Arthur Bennett of number 78 Eighth Avenue, Newark, has filed with the Commissioner of Motor Vehicles policy number 648 in the Jersey Mutual Casualty Insurance Company, Inc., covering Shaw cab, engine number 563V41252; serial number blank; registered number 01474, in accordance with the provisions of Chapter 231 or 249 of the Pamphlet Laws of 1926 dated October 28, 1928, and signed by William L. Dill.

I wish to read into the record a statement accompanying this certificate.

Mr. Seymour: May I see it before that is done?

Mr. Hornstein: Yes.

Mr. Seymour: No objection to it.

Mr. Hornstein: This is a copy of a letter presumably on the stationery of the Jersey Mutual Casualty Insurance Company, Inc., Federal Trust Building, number 24 Commerce Street, Newark, New Jersey, dated May 23, 1927. It gives the names of the officers of the company and directors and it is addressed to William L. Dill, Trenton. "Dear Sir: We would ask that you please return to this office policy number 648 issued in the name of Arthur Bennett of number 78 Eighth Avenue, Newark, New Jersey, as same is in order for cancellation. Yours very truly, Jersey Mutual Casu-

alty Insurance Company, Inc., by Alexander T. Morelli, Manager, dated May 23, 1927," which is subsequent to the date of the original accident.

(Same is marked P-5.)

I now ask Mr. Seymour to produce the original policy mentioned in that certificate or a copy of it.

Mr. Seymour: Your notice to produce was to produce a duplicate of it.

Mr. Hornstein: I served a subpoena to produce the original.

Mr. Seymour: Read the notice and see what it says.

Mr. Hornstein: Have you a duplicate?

Mr. Seymour: There is no duplicate.

Mr. Hornstein: Have you the original?

Mr. Seymour: Yes, here it is.

Mr. Hornstein: I wish to note on the record that this is the original policy number 648, automobile cab liability policy expiring October 1, 1927, issued to Arthur Bennett, number 78 Eighth Avenue, Newark, New Jersey, by the Jersey Mutual Casualty Company, Inc., and I beg leave to read that part thereof of the first paragraph which reads as follows:

Mr. Seymour: I object and the reason is that the proof is now at variance with the pleadings. The pleadings charge that on or about March 27, 1927, this policy was issued and the offer of proof here is exactly different from that. The proof also says here in the complaint paragraph.

6. That on January 1, 1927, and I refer now to the pleadings in this particular case, that on January 1, 1927, the said Arthur Bennett entered into a contract with the Jersey Mutual Casualty Insurance Company in which they agreed to indemnifying him for any other loss or any other expense—

Mr. Hornstein: May I interrupt. The date of the policy reads October 1, 1927, and the actual date of issuance reads October 1, 1926.

Mr. Seymour: That may be a typographical error. It refers in paragraph six of the policy for $5,000 for one person and $10,000 for two persons and the proof is contrary to that and for that reason is objectionable.

The Court: The specific variance is what?

Mr. Seymour: The allegation in paragraph six is that the plaintiff in the present suit charges that a contract was made between Arthur Bennett and the company and the offer of the plaintiff is a policy dated October 1, 1926, and in paragraph six of the complaint it is alleged he had a policy indemnifying him in the amount of $5,000 for one person and $10,000 for two persons and that is entirely contrary to the language of the proof.

The Court: As I understand it, the plaintiff has alleged that there was a policy dated January 1, 1927, entered into between one Arthur Bennett and the defendant.

Mr. Hornstein: May I amend by striking out the "entered into" and say, "had a policy on January 1st"?

The Court: In which it is agreed among other things that any loss or expense not exceeding $5,000 for the injury or death of one person and $10,000 for the injury or death of two, is that in here?

Mr. Hornstein: Yes.

Mr. Seymour: That is not in that policy.

Mr. Hornstein: The allegation is that there was a policy in effect at or about the time of the accident. As a matter of fact, there is only one and that is the one.

The Court: I think you are right. I think the date of the contract of insurance and its price terms may be a case of considerable difference between Arthur Bennett and the company and what this plaintiff is insisting on is the insurance policy that was in existence no matter whether it was dated January 1st or whether it provides for $5,000 or $10,000 liability, I think that is as you suggest a non-essential. As I read the complaint some of the facts which you have here or some of the pleadings you have here so far as the date and the amount may be wrong, but you are apparently attempting to fix the liability upon the defendant under a policy of insurance and this is the policy. You may have an exception.

Mr. Seymour: Your Honor will bear with me for a few minutes. Here is where the importance of that comes in. As your Honor well knows when we come to court to try a case we depend on the pleadings. The plaintiff says that we have a $5,000 to $10,000 policy and we deny that and now he says he did have a policy that was issued in October, 1926, and it was not a $5,000 or $10,000, it was $5,000. There is such an allegation in this complaint there and the proof it seems to me to entitle us to a nonsuit, because I am prepared to show now that on January 1, 1927, we did not enter into a contract with anyone by that name and we did not have a $5,000 or $10,000 policy issued to Arthur Bennett.

The Court: I do not think you are not correct in your statement of the law, Mr. Seymour, that there may be a variance between the proven facts and the pleadings, but I think that must be interpreted with some degree of common sense. That is one of the reasons why litigations stretch

out an unusual length of time. You may have an exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: It would be much wiser, Mr. Hornstein, hereafter when you are going after anyone on a written instrument to make sure of the written instrument.

Mr. Hornstein: I offer the contract in evidence.

(Same is marked Exhibit P-6.)

Mr. Hornstein: The plaintiff rests reserving the right to prove notice to the company of the occurrence of this accident. With that reservation I would like to rest.

The Court: Have you proved yet that an automobile of the motor number and serial number identified by the policy was in the accident in which you obtained this judgment?

Mr. Hornstein: That was pleaded and proved in the original suit which went to trial by judgment as a matter of judicial determination.

The Court: You mean in this case in the Supreme Court?

Mr. Hornstein: Yes, your Honor.

The Court: You plead that the defendant Arthur Bennett was the owner of a Shaw yellow taxi bearing New Jersey license, that is the registration I presume for the year 1927 number 01982T. Now, there is a certificate from the Motor Vehicle Department giving you an engine number which corresponds with the engine number in the policy, but there is no other identification. Do you see what I mean? Have you connected this?

Mr. Hornstein: After this certificate was filed in 1926 with the policy, subsequently the license number of the car was changed in 1927, the one alleged covering the same cab. I think I have a card here from the Motor Vehicle Department showing that. I have a copy of a letter written to the Commissioner of Motor Vehicles and in return I have a card post marked by the Commissioner that in 1927 license No. 01982T was issued to cover a Shaw taxicab.

The Court: I think that is covered by interrogatories.

Mr. Hornstein: With the permission of the Court, I would like to rest now, reserving the right if the Court deems it necessary, to prove actual notice to the Company of the occurrence of this accident, but my understanding of the law is affecting the situation in question and similar situations as it has been construed by the court of last resort of this state, in my opinion makes it unnecessary to prove actual notice.

(Argument.)

The Court: How does that affect one who is injured? The policy does set forth that the assured shall give to the company immediate notice of any accident and also give notice of any claims on account of said accident. If suit is brought against the assured to recover damages I do not see how that affects one who is injured. Suppose the assured and the company should collude? Suppose the company should say to the assured, "Do not give me any notice of this defendant, I have a perfect defense," of course the person injured does not know who the insurance company is or where it is or the amount of the policy or anything else. However, Mr. Seymour knows more about that than I do, probably.

Plaintiffs rest.

Case.

Mr. Seymour: I now make a motion to nonsuit the plaintiff on the plaintiff's case and I have several grounds on which I rest that motion. My first ground is to the record, the transcript of the record in the New Jersey Supreme Court introduced by the plaintiff and marked Exhibit P1. The record distinctly shows that on May 23, 1927, the defendant Arthur Bennett was served personally by process. The next in the transcript is an answer of the defendant Arthur Bennett in which the defendant denied every material allegation in the complaint. The answer was filed on the 14th of June, 1927. The complaint or rather the summons was served on May 23rd. The next that appears is a rule for interlocutory judgment and that rule is actually entered on time in July, 1927, by Raskin, Hornstein and Ruskin, who were the attorneys for the plaintiff in that suit and are the attorneys for the plaintiff in this suit. The next appears on the record is November 19, 1927, that on motion by Raskin, Hornstein and Ruskin an order allowing the administrator to defend the suit on the death of the defendant Arthur Bennett. The only notice this Court has to that effect is the statement in this notice to the effect that it appeared to the Court that Arthur Bennett died on the 9th day of September, 1927, and I respectfully urge upon the Court that that is not the way nor has this Court any first hand knowledge of the fact that Arthur Bennett is not yet alive, and for that reason it does not appear here what petition was made here for this order nor does it appear what affidavits are on that order, nothing but the plain allegation of the plaintiffs' attorneys that on the 9th day of September, 1927, Bennett died. The next notice appears to be dated Novem-

ber 16, 1927, which says that on Saturday the 19th day they made a motion in the Supreme Court for the appointment of an administrator pendente lite Thomas Davis and they say on the 19th they are going to make a motion for substituting the deceased. On the same day, November 19th, they give notice to the administrator that on Monday the 5th of December they are going to apply for the empaneling of a jury for the purpose of assessing damages. The next that appears is a motion that is entered on September 12th which is an order of reference for the assessment of damages. I call the Court's attention particularly to the fact that according to these papers here Bennett died on the 9th of September, 1927, and on September 12th, 1927, they have a motion for an order of reference for the assessment of damages; the notice was actually entered on the 12th and the order made on the 10th.

My motion on that particular part is this: That under our Practice Act it is required that if one wants to assess damages he must give notice to the person who is the defendant; in other words, the right to assess damages, the right to try one's case, the person who is interested shall receive notice of such assessment of damages. It appears according to these papers that on my motion for a nonsuit we have to assume that these papers are correct, that on September 9th Bennett died and that on September 10th they took an order to assess damages by a jury. In this transcript there must be some notice, there must be some record here to show that when that order was made that notice has been given so the defendant could have jointly put in any proof it wanted to on the assessment of damages. I call the Court's attention to

this, that under our Practice Act we have twenty days in which to file an answer and I will admit that the Practice Act says distinctly that if you are out of time on that twenty days you are out of time and you lose your day in court, but on May 23rd this man was served and on June 14th he files his answer and that is a denial of every material allegation in the complaint, and from the 23rd of May to the end of May there were eight days with fourteen days in June, in other words, twenty-two days from the service of the complaint until the filing of the answer. The defendant had twenty days to answer and I think the Court can take judicial notice that the 30th of May is a legal holiday and I do not have to tell this Court that in a twenty-day calendar there are several Sundays. The point is this: This man was out of time in his answer, but if he was, there is nothing here to show there was anything done to strike that answer out. He goes right ahead and the answer is served and filed and he does nothing about it but takes an interlocutory judgment, which your Honor or any other judge will sign when I present an order and say it is O. K. at that time, and you will sign the order. In this instance he shows by his own transcript that this defendant was actually in default for the purpose of one day. Then takes his order of interlocutory judgment and on the 10th of December comes into Court and takes an order for the assessment of damages. The point is that this defendant whether he was alive or dead on the 10th of September, he was entitled to notice that they were going to assess damages on the default judgment and they must give him that notice, and the law says specifically he must get notice. They did not do that and

then in November they had an administrator appointed in this case for the purpose of substituting some person for this man. They set up an artificial person and that artificial person on the 9th of November is appointed administrator. I say to you that that is a peculiar proceeding.

(Argument.)

The first ground is that the record does not show that notice of the assessment of damages was given to the defendant Bennett.

2. My next motion is and for this reason I would like to call the Court's attention particularly to Exhibit P-6 which is the original policy of insurance issued to the defendant Arthur Bennett. I would like to renew briefly and without wasting any time on it my original motion before and that is that the proof as submitted is so greatly at variance with the pleadings in the case that I am entitled to a nonsuit as to that. I refer particularly to paragraph six of the complaint.

I say that the policy offered, Exhibit P-6, is so greatly at variance with the allegations in the complaint that I should have a nonsuit on that.

3. In paragraph eight of the complaint it alleges that the contract of insurance entered into between Bennett and the company provided that the bankruptcy or insolvency of the said Bennett should not relieve the company from the payment of such indemnity as would have been payable except for such bankruptcy or insolvency. I respectfully call the Court's attention to the fact that there is no part of the policy, Exhibit P-6, which contains any such provision and I urge on that that there is such a variance between the proof and the allegation that I should have a nonsuit.

Case.

4. My further motion for a nonsuit is that the transcript of the Supreme Court containing the original complaint marked Exhibit P-1 in this case, in which Bennett was the defendant, alleges in paragraph one that the defendant Arthur Bennett was the owner of a Shaw yellow taxi bearing New Jersey license for the year 1927 No. 01982T.

The Court: That is the transcript you are referring to?

Mr. Seymour: Yes. I now refer to Exhibit P-4, a certificate from the Commissioner of Motor Vehicles which certifies that Arthur Bennett had policy No. 648 and which certifies that the registration number was 04174. My contention is there that it shows clearly from the proof that the automobile which was alleged to have had this accident at this time and in which these persons were supposed to have been injured had registration number 01982T and the proof of No. 04174 is so directly contrary as to show conclusively that the car, which was in the accident, which Bennett is charged with operating, was not the car insured by this company. Also in that respect I would like to call the Court's attention to the fact that in Exhibit P-6, which is the original policy of insurance, there is no state registration of any kind, in other words, where it says "state license" there is no number.

The Court: They have simply the engine number?

Mr. Seymour: Yes, your Honor.

The Court: Engine and motor numbers?

Mr. Seymour: The point of that motion is that the automobile that caused the accident or was in the accident is not sufficiently identified for the

purpose of holding us, and for that reason we should have a nonsuit.

5. I have another point to urge and in that regard I would like to call the Court's attention to this policy No. 648 and read the clause here which practically sets out the contract of insurance. Suppose someone takes a car who is a stranger to us and a stranger to the owner and caused an accident with that automobile. I do not have to tell your Honor that if I prove that, if I can prove that that is the automobile which was stolen and while in the possession of that stranger who stole it he causes damage, your Honor would give me a nonsuit as against that defendant. In this particular instance, it first did not appear to the Court the cause of the injury and second it did not appear who was driving the car, whether it was the driver of the owner or the agent of the owner, and whether the car was being used at that particular time as a taxi. If these Migatz people could allege that they were passengers in this car, if they could allege they were using this car as a taxicab, then, I think the Court has a right to assume that the car was actually being used as a taxicab in accordance with Chapter 231 at that time.

(Argument.)

Mr. Seymour: It does not follow and you cannot read into that record that at that time or at that place Bennett's car was being used as a taxicab, and I say this taxicab at that time was being used without the permission of Bennett and used without his knowledge and he would have a perfect defense on the record. If he had such a defense this Court would not hold him in. That is

all his complaint shows in this case: 1st, a very great variance between the proofs and the allegations in the complaint, each complaint. Next it did not show anything about what this automobile was being used as. I do not know, you do not know and we do not know how it was being used. Last but not least my contract with this man Bennett was a contract of indemnity. I have no policy of insurance, I have a contract with him and I said that I agreed to indemnify him, that is what I did. I didn't say I was going to be responsible for anyone out on the street that was going to be hurt. I said, "If you use this car, if you operate, maintain or own this wagon I have described here, and it was actually being used as a taxi, described in Chapter 231 of the laws of 1926, and if an accident results in the operation and ownership of it, if you are called upon to pay $5,000, I will pay you."

I have given the other side a contract of indemnity to Bennett. According to the plaintiffs' papers Bennett died on September 9th, and I do not have to tell your Honor that they must have four days' notice of motion. On September 9th Bennett was alive, because on that day according to their papers he died and their notice of motion is, or rather their order was taken on the 10th day of September, 1927, on motion of Raskin, Hornstein and Ruskin, the attorneys all the way through.

Now, if your Honor please, Bennett lived at least three days before September 9th, because that is the day he died and he was living before that. He was available and he should have been served with a notice. They gave him no such notice and the man dies and in November and they

have an administrator appointed and he turns around and takes the notice which they give him. I do not think it is material to the extent of being vital, but I would like to call the Court's attention to this, part of the proofs here, Exhibit P-2, which purports to be the return of the Sheriff of the County of Essex, in which he returns the execution unsatisfied. I want to call the Court's attention to this in particular, and that is that the execution was issued on the 13th day of December, 1927, and on the 21st day of December, 1927, the Sheriff of the County of Essex, Conrad Deuchler, appointed one of his deputies to make the levy and the next thing we have is a certificate to the effect that he can find neither goods nor chattels and returns the execution unsatisfied signed by Harry L. Huelsenbeck, Sheriff. I think the Court should take judicial notice that Mr. Huelsenbeck became Sheriff on December 1st, 1929. For the purpose of meeting the offer that the plaintiff wanted to meet, I show that this return of an unsatisfied execution on its face is erroneous and cannot be taken at its face value.

I ask the Court on the objections alleged to direct a judgment of nonsuit.

The Court: The recitation of these facts, I think, will dispose of the motion. I have before me an exemplified copy of the record in the New Jersey Supreme Court of a case which was brought in that Court by Herbert Migatz and Loretta Migatz who are plaintiffs in the case, which we have before us. That action was brought against one Arthur Bennett doing business as the Globe Taxi Company and Carroll D. Henderson. The chronology of that case gathered from this exemplification is as follows: In 1927, May 19th,

summons attested; May 23rd, summons served. Answer was filed out of time by Bennett. July 12th a rule for interlocutory judgment was entered. November 19th the Chief Justice appointed Thomas A. Davis, Jr., in place of the defendant Bennett, said Davis having been appointed Administrator of the estate of Bennett who died. The order appointed Davis as substitute defendant for the deceased. On November 19th Davis was served with a notice of that motion so that after he was appointed by the Surrogate he knew that he was to be the substituted defendant in this case. After the Chief Justice signed an order appointing him to take the place of Bennett, as Administrator, pendent lite, the substituted administrator was given notice that an application would be made on December 5th to Judge Smith to try this case with a jury drawn from the general panel; Judge Smith had formerly had his authority from the Chief Justice to try the case, an order being on record to that effect. The case came on before Judge Smith and the substituted administrator had notice of that trial, and after the case was tried before Judge Smith judgment was entered in favor of Herbert Migatz for $2,000 and Loretta Migatz for $8,000. Execution was issued on this judgment and returned unsatisfied. The two plaintiffs now turn to the insurance company, alleging that this company had a policy which was in effect at the time of the accident for which they sued and look to the company for indemnification. The question of identity has been raised. According to the complaint filed in the original action, or the first action in this Court against Arthur Bennett it was alleged that Bennett was the owner of a Shaw automobile bearing

New Jersey license for 1927 No. 01982-T. To connect that so as to indicate the policy covered that car we have the following proof: That the Commissioner of Motor Vehicles upon receipt of a policy from Bennett, taken out by the defendant company, which policy was No. 648 and which is in evidence, filed the policy and it appears that in accordance with that policy a Shaw car with an engine No. 563V41252 was covered. The registration number was different. So now we have not only the license number but according to the number of the identification so far as it indicates that this engine number and that car number will probably show it was the car, in view of the action which took place before Judge Smith, but this was all cleared up by answers to interrogatories served on the defendant and this question was asked, "State whether policy was issued by the defendant Jersey Mutual Casualty Company, Inc., to Arthur Bennett doing business as Globe Taxi Company and using Shaw taxi bearing license number 01982-T for the year 1927 and named in the first complaint filed in the Court upon which they obtained judgment," and then this question, "Does No. 563V41252 registered engine number issued by Commissioner of Motor Vehicles identify the car?" and the answer to that is, "Yes."

I will deny the motion because as to the first ground for your motion for a nonsuit, I have covered it by the chronology of the case which was tried, evidently, before Judge Smith. The question of variance I have passed upon. The fourth ground of your motion as to the identity of this car I have just passed upon, because I think it

appears positively from the evidence before me that when this right of action arose Bennett had this policy and owned this car.

You may have an exception.

Mr. Seymour: Did your Honor pass on the motion for lack of notice as required by the Practice Act, that they are not entitled to a judgment of damages without giving us notice and there is not any notice in the transcript?

The Court: Are you sure of that? If there wasn't it wouldn't make any difference. This judgment is regularly entered in the Supreme Court and I cannot attack it.

(Argument.)

The Court: After Bennett died the administrator pendente lite was appointed by the Chief Justice and at that time no judgment had been entered. On the 19th day of November, the administrator was served with a notice that the plaintiff would apply to Judge Smith to empanel a jury drawn from the general panel to assess damages on the complaint. On July 12th the plaintiffs' attorneys took an order for interlocutory judgment by which under our law was to try to stop the defendant from proceeding with his suit after having his day in court. That rule was entered on the 12th day of July.

Mr. Seymour: The point I am making is that on September 12th they took an exparte order from the Chief Justice and that order was an order of reference for the assessment of damages. There is nothing in this transcript which shows that Bennett ever received any notice of this order made on the 12th day of July or entered in the minutes of the Court, nor is there anything

in the transcript to show that the order entered on September 12th of the Chief Justice—

The Court: Damages must be assessed after giving notice to the defendant.

Mr. Seymour: I understand your Honor denies the motion as to the fact that it is not necessary for him to prove affirmatively in his case that the car was being used, maintained and operated in accordance with Chapter 231 of the laws of 1926?

The Court: No, I will not require him to prove that on his case.

Mr. Seymour: Your Honor will deny that motion, too?

The Court: Yes.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Isidore Hornstein sworn in behalf of defendant.

Direct examination by Mr. Seymour.

Q. You are the attorney of these plaintiffs? A. I am.

Q. You are the Isidore Hornstein who is a member of the firm of Raskin, Hornstein and Ruskin, the attorneys in the original suit? A. Yes.

Q. Let me direct your attention to this letter dated June 20, 1927, and I ask you if that is the original letter from your office? A. It is.

Mr. Seymour: I offer this letter in evidence.

Mr. Hornstein: I object to it as irrelevant and immaterial and as having no bearing on the case and as being collateral to this issue.

The Court: How is that important?

Mr. Seymour: It shows direct knowledge that the plaintiffs, through their attorneys, knew that Bennett was alive and filed an answer on the 14th of June.

The Court: I will admit it. It doesn't hurt you any.

(Letter is marked Exhibit D1.)

Paul J. O'Neil sworn in behalf of the defendant.

Direct examination by Mr. Seymour.

Q. You have had charge of the Claim Department of the Jersey Mutual Casualty Insurance Company for three years, haven't you? A. Yes, sir.

Q. Since about October 1, 1926? A. Yes, sir.

Q. As such were you familiar with all claims for damages made by assureds of the company at that time? A. I was.

Q. Did you ever receive any claim from this very man named Arthur Bennett as to any accident he had with his car? A. I did not.

Paul J. O'Neil, cross.

Cross examination by Mr. Hornstein.

Q. Were you notified by the Commissioner of Motor Vehicles that Arthur Bennett had this accident? A. No, sir.

Q. Did your company request the cancellation of this particular policy after the accident? A. I had nothing to do whatever with that part of the work. That was the duty of the underwriting department. All I did was taking care of claims, expenses and reports and preparation of suits for trial.

Q. Is there anyone in your department who examines police blotters for the record of accidents in which your company may be interested? A. No, the first knowledge we have is when an accident report is received either personally or through the mail.

Q. I ask you to look at this newspaper report of an automobile accident, and I ask you whether you ever saw, read or heard of it. A. This particular part?

Q. That has particular reference to the accident there reported by Herbert and Loretta Migatz. A. I never saw that paper.

Q. Did Mr. Bennett or anyone representing Mr. Bennett ever call upon the Jersey Mutual Casualty Insurance Company and request them to defend him in the suit then pending in the Supreme Court of Essex County? A. No one ever gave us any notification of this accident or suit until such time as we received your complaint against the Jersey Mutual Casualty Insurance Company.

Paul J. O'Neil, cross.

Q. Tell the court and jury from your records when your company first received the summons and complaint in connection with this first suit? A. We received the summons and complaint first on May 25th about one o'clock in the afternoon.

Q. What year? A. 1928.

Q. Your answer refers to the summons and complaint in the suit of Loretta and Herbert Migatz against Arthur Bennett. A. Herbert and Loretta Migatz against the Jersey Casualty Insurance Company, the summons which I hold now in my hand.

Q. You mean to tell this court and jury you had absolutely no knowledge of either the accident or this pending suit? A. Are you referring to the original suit against Bennett personally?

Q. Yes. A. I had absolutely no knowledge of that accident or suit until such time as we received this paper dated the 22nd of May, 1928, received by us May 25, 1928.

Q. Do you know of your own knowledge when Mr. Bennett paid his last premium in connection with that policy? A. I don't know that, that is the underwriting department's work.

Q. Is the underwriting department in court? A. You better ask Mr. Seymour that.

Mr. Seymour: I ask Loretta Migatz to stand up so that the jury can see her, and Herbert Migatz, her husband, who is sitting next to her, and with that the defendant rests.

Defendant rests.

Herbert Migatz, direct.

HERBERT MIGATZ, one of the plaintiffs, sworn in his own behalf, in rebuttal.

Direct examination by Mr. Hornstein.

Q. You are one of the plaintiffs in this suit? A. Yes, sir.

Q. And you were a plaintiff in the original suit brought against Arthur Bennett, trading as the Globe Taxi Company? A. Yes, sir.

Q. Did you immediately after the accident have a conversation with Arthur Bennett?

Mr. Seymour: I object.

The Court: How is that rebuttal?

Mr. Hornstein: I do not want to bring out what the conversation was, but what it led to and what information he got from Bennett to connect up this company.

The Court: What do you want to prove of Mr. Migatz, that Mr. O'Neil did have notice?

Mr. Hornstein: Yes, your Honor, that is the purpose.

The Court: Why don't you ask him if he gave notice to O'Neil or the company as contradicting Mr. O'Neil? Mr. O'Neil said he did not have notice, but did not say his company did not, so you will have to contradict him.

Mr. Hornstein: I will withdraw the witness.

Plaintiffs rest.

Mr. Hornstein: I respectfully move for the direction of a verdict on the ground that there is absolutely no disputed question of fact in the case and the records offered in proof substantiate the claim fairly. There is no material dispute as to any fact in the case and I think from the records before the court we are entitled to a direction.

Mr. Seymour: I am going to ask your Honor to direct a verdict for the defendant at this time and I at this time renew all my motions for a nonsuit and on the further ground for a direction I want to refer particularly to the transcript which provides that on December 5, 1927, Judge Smith signed an order saying that a jury had considered this matter and had returned a verdict in favor of Herbert Migatz for $2,000 and the other plaintiff Loretta Migatz for $8,000 against the estate of Arthur Bennett. My first objection to that is this: My policy is a personal policy issued to Arthur Bennett for the operation of a taxicab and I do not have to tell your Honor that while administrators have a right to be substituted for lots of things there is nowhere in the records where we find that this administrator was substituted for the purpose of operating a taxicab.

On the further ground that there is nothing in the record and postea to show that this verdict was the result of personal injuries sustained by reason of ownership and operation of the taxicab in accordance with Chapter 231 of the laws of 1926. A further point is that if this plaintiff had anything but

personal injuries caused by the use of this car as a taxicab then we are not liable; if this verdict was for the loss of Mr. Migatz' car we cannot be held for that because the policy distinctly states that it is for a personal liability and not property damage.

The Court: The limit of the liability seems to be $5000 on this policy. Suppose I direct a verdict, how do you expect me to apportion it?

Mr. Hornstein: If I may respectfully suggest, the policy reads $5000 for injuries to any one person. It particularly specifies "Any one person". In this case I am satisfied to have a verdict directed in favor of Loretta Migatz against the defendant for the sum of $5,000 and for Herbert Migatz against the defendant in the amount of $2,000.

The Court: Loretta Migatz got $8,000 and Herbert Migatz $2,000?

Mr. Hornstein: Yes, your Honor.

The Court: Gentlemen of the Jury, I direct that you bring in a verdict in favor of the plaintiff Herbert Migatz against the defendant in the amount of $2,000 and a judgment in favor of Loretta Migatz against the defendant in the amount of $5,000.

Defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Exhibit D-1.

RASKIN, HORNSTEIN & RUSKIN
Attorneys and Counsellors at Law
1 Exchange Place
Jersey City, N. J.

Telephone Montgomery 9706, 9707

Alexander Raskin
Isidore Hornstein
Victor Ruskin

June 20, 1927.

Benjamin W. Miller, Esq.,
Counsellor at Law,
156 Market Street,
Newark, New Jersey.

Re: Migatz-vs-Bennett.

Dear Sir:

We understand that you represent the defendant, Arthur Bennett, in the above entitled cause and you filed an answer in his behalf on the 14th inst.

Please be good enough to send us a copy of the same, and oblige.

Very truly yours,

RASKIN, HORNSTEIN & RUSKIN,
by J. Hornstein.

1422/H.

Exhibit P-1.

TRANSCRIPT.

THE STATE OF NEW JERSEY TO ARTHUR BENNETT, DOING BUSINESS AS GLOBE TAXI COMPANY, and CARROLL D. HENDERSON. You are [SEAL] summoned to answer the annexed complaint of Herbert Migatz and Loretta Migatz in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this nineteenth day of May, Nineteen Hundred and Twenty-seven.

EDWARD J. KELLEHER,
Clerk.

RASKIN, HORNSTEIN and RUSKIN,
Attorneys.

Exhibits.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* ARTHUR BENNETT, doing business as GLOBE TAXI COMPANY, and CARROLL D. HENDERSON, *Defendants.*	Action at Law. COMPLAINT.

Plaintiffs, Herbert Migatz and Loretta Migatz, his wife, residing in the City of Newark, County of Essex and State of New Jersey, complain of the defendants, Arthur Bennett and Carroll D. Henderson:

FIRST COUNT.

1. Defendant, Arthur Bennett, on or about March 27, 1927, was the owner of a Shaw yellow taxicab, bearing New Jersey license for the year 1927, O1982-T.

2. On or about said date, the plaintiffs, Herbert Migatz and Loretta Migatz, were passengers in an automobile operated by the plaintiff, Herbert Migatz, and were proceeding easterly along Waverly Avenue at or about a point where the said Waverly Avenue intersects Somerset Street, and were crossing said intersection.

3. The defendant, Arthur Bennett, at or about said time, by his servant and agent, the defendant, Carroll D. Henderson, operated and drove his said taxicab northerly along said Somerset Street,

at a high and excessive rate of speed, and without warning, negligently and carelessly ran into and collided with the automobile in which said plaintiffs were passengers, overturning and demolishing the same and severely and painfully injuring both plaintiffs.

4. Because of the negligence and carelessness of said defendants, the plaintiff, Loretta Migatz, sustained a fracture of the nose, a fracture of the skull, a fractured pelvis and other serious internal injuries. Said injuries are permanent and by reason thereof, said plaintiff endured, still endures and will in the future endure great pain and suffering, and will be crippled for the remainder of her natural life, and by reason thereof was, is and will be unable to attend to her necessary domestic affairs which she otherwise could and would have done, and she will never be able to attend to her household duties by reason of said accident because of the permanent character of said injuries.

Plaintiff, Loretta Migatz, demands Seventy-five Thousand ($75,000.) Dollars damages.

SECOND COUNT.

1. Paragraphs One (1), Two (2) and Three (3) are realleged and made a part hereof.

2. Because of the negligence and carelessness of said defendants, the plaintiff, Herbert Migatz, was severely and painfully injured in and about the head, body and limbs to his great damage, pain and suffering.

3. The plaintiff, Herbert Migatz, is the husband of the plaintiff, Loretta Migatz, and by reason of the negligence of the defendants as above

set forth, he has been obliged to and did expend divers large sums of money for doctors, nurses and medicines, endeavoring to cure said plaintiff of her said injuries and their consequence, and he will in the future be obliged to expend large sums of money in an endeavor to effect a cure of the said injuries. Said plaintiff also lost the services of his wife and he will continue to lose such services for a long period of time.

Plaintiff, Herbert Migatz, demands Twenty-five Thousand ($25,000.) Dollars damages.

RASKIN, HORNSTEIN AND RUSKIN,
Attorneys of Plaintiffs.

I hereby appoint and depute Daniel Demarest, Jr. to serve the within writ.

Witness my hand and seal this 21st day of May 1927.

CONRAD DEUCHLER
Sheriff.

By RUPERT F. MILLS,
Under Sheriff.
(L. S.)

Sheriff Fees $6.78

May 26 1927

Served the within Summons & Complaint May 23, 1927 Personally upon Arthur Bennett doing business as Globe Taxi Co. within named defendant at his principal place of business 123 Broome St. Newark, N. J. Defendant Carroll D. Henderson Inc. New York.

CONRAD DEUCHLER
Sheriff

By D. DEMAREST JR.
Sp. Deputy.

Exhibits.

SUPREME COURT OF NEW JERSEY,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* ARTHUR BENNETT, doing business as GLOBE TAXI COMPANY, and CARROLL D. HENDERSON, *Defendants.*	Action at Law. ANSWER OF DEFENDANT ARTHUR BENNETT.

The defendant Arthur Bennett residing in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST DEFENSE TO FIRST COUNT.

1. The defendant admits the allegations of paragraph 1, of said complaint.

2. He has no knowledge of the matters set forth in paragraph 2 of said complaint sufficient to form a belief, but puts plaintiffs to their proof.

3. He denies the allegations set forth in paragraph 3 of said complaint.

4. He has no knowledge of the matters set forth in paragraph 4 of said complaint sufficient to form a belief, and puts plaintiffs to their proof.

SECOND DEFENSE TO FIRST COUNT.

The defendant his agent or servant was not guilty of any negligence, but that the plaintiffs

were guilty of contributory negligence in that at the time and place mentioned in the Complaint they were operating and conducting themselves in a reckless and careless and negligent manner and did not use that degree of care then and there required for their own safety in view of the existing conditions.

Wherefore defendant demands that Complaint be dismissed with costs.

FIRST DEFENSE TO SECOND COUNT.

1. The defendant admits the allegations of paragraph 1, of said Complaint, and as to paragraph 2 he has no knowledge of the matters set forth sufficient to form a belief, and puts plaintiffs to their proof, and as relates to paragraph 3, he denies the allegations set forth.

2. He has no knowledge of the matters set forth in paragraph 2 of the second count of said complaint, sufficient to form a belief and puts plaintiffs to their proof.

3. He denies the allegations as is set forth in paragraph 3 of the second count.

SECOND DEFENSE TO SECOND COUNT.

The defendant repeats as is alleged in the Second defense of the first count.

Wherefore the defendant demands that complaint be dismissed with costs.

BENJ. WM. MILLER
Attorney for Defendant
Arthur Bennett.

Exhibits.

NEW JERSEY SUPREME COURT.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* vs. ARTHUR BENNETT, doing business as GLOBE TAXI COMPANY, *Defendant.*	Action at Law. RULE FOR INTERLOCUTORY JUDGMENT.

The summons and complaint in this cause having been duly served personally upon the defendant, Arthur Bennett, doing business as Globe Taxi Company, on May 23rd, 1927, and said defendant having failed to file an answer or take any other step in response to the complaint within the time limited by the rules of Court,

It is on this 12 day of July, 1927, on motion of Raskin, Hornstein & Ruskin, Attorneys of the plaintiffs, ORDERED that judgment interlocutory be entered against the defendant, Arthur Bennett, doing business as Globe Taxi Company, and in favor of the plaintiffs, Herbert Migatz and Loretta Migatz, and

It is further ORDERED that the damages of the plaintiffs be assessed by a jury drawn from the general panel during its attendance at the Essex County Circuit. Rule actually entered this 12th day of July, 1927.

On motion of

RASKIN, HORNSTEIN & RUSKIN,
Attorneys.

Exhibits.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* ARTHUR BENNETT, doing business as GLOBE TAXI COMPANY, and CARROLL D. HENDERSON, *Defendants.*	Action at Law. ORDER OF REFERENCE FOR ASSESSMENT OF DAMAGES.

Application having been made to me on behalf of plaintiffs for the assessment of their damages in this action by a jury drawn from the general panel, and it appearing that judgment interlocutory by default has been entered in favor of plaintiffs, and against the defendant, Arthur Bennett, doing business as Globe Taxi Company, upon said defendant's failure to file an answer within the time required by law,

IT IS, on this 10th day of September, 1927, on motion of Raskin, Hornstein & Ruskin, Attorneys of Plaintiffs, ORDERED, that plaintiffs' damages be assessed by a jury drawn from the general panel during its attendance at the Essex County Circuit under the direction of the Honorable William A. Smith, Circuit Court Judge, to whom the same is hereby referred.

WM. S. GUMMERE
C. J.

Entered September 12, 1927.
On motion of
RASKIN, HORNSTEIN & RUSKIN,
Attorneys for Plaintiffs.

Exhibits.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ,
Plaintiffs,

vs.

ARTHUR BENNETT, doing business as GLOBE TAXI COMPANY, and CARROLL D. HENDERSON,
Defendants.

Action at Law.

NOTICE OF APPLICATION TO ASSESS DAMAGES.

To:

THOMAS A. DAVIS, JR., Esq.,
Administrator *pendente lite* of the estate of Arthur Bennett, deceased, and

BENJAMIN WILLIAM MILLER, ESQ.,
Attorney of record for the said Arthur Bennett, deceased.

Sirs:

PLEASE TAKE NOTICE that on Monday, the 5th day of December, 1927, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court House, in the City of Newark, we shall apply to the Honorable William A. Smith, Circuit Court Judge or to such other judge as may then preside in the Supreme Court, Essex County Circuit, for the empaneling of a jury drawn from the general panel for the purpose of assessing damages on the complaint in the above cause, pursuant to an order made in the above cause on September 10th, 1927.

Dated: November 19th, 1927.

RASKIN, HORNSTEIN & RUSKIN
Attorneys of Plaintiffs.

Exhibits.

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* ARTHUR BENNETT, doing business as GLOBE TAXI COMPANY, and CARROLL D. HENDERSON, *Defendants.*	Action at Law. ORDER ADMITTING ADMINISTRATOR TO DEFEND SUIT ON DEATH OF DEFENDANT, ARTHUR BENNETT.

It appearing to the Court that Arthur Bennett, the above named defendant, died on the ninth day of September, 1927, and it further appearing that letters of administration of all and singular the goods and chattels, rights and credits of the said Arthur Bennett were in due form of law granted to Thomas A. Davis, Jr., by the Surrogate of Essex County, New Jersey,

IT IS, on this 19th day of November, 1927, on motion of Raskin, Hornstein & Ruskin, Attorneys for the Plaintiffs, ORDERED, that Thomas A. Davis, Jr., Administrator of the estate of the defendant Arthur Bennett be and he is hereby substituted as a party defendant in the place and stead of the defendant Arthur Bennett, deceased, and that all further proceedings in this cause be continued in the name of the said Thomas A. Davis, Jr., administrator as aforesaid.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
C. J.

Entered November 19, 1927.
On motion of
RASKIN, HORNSTEIN & RUSKIN,
Attorneys for Plaintiffs.

Exhibits.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* ARTHUR BENNETT, doing business as GLOBE TAXI COMPANY, and CARROLL D. HENDERSON, *Defendants.*	Action at Law. NOTICE OF APPLICATION TO ASSESS DAMAGES.

To:

THOMAS A. DAVIS, JR., ESQ.,
Administrator *pendente lite* of the
estate of Arthur Bennett, deceased, and

BENJAMIN WILLIAM MILLER, ESQ.,
Attorney of record for the said
Arthur Bennett, deceased.

Sirs:

PLEASE TAKE NOTICE that on Monday, the 5th day of December, 1927, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court House, in the City of Newark, we shall apply to the Honorable William A. Smith, Circuit Court Judge, or to such other judge as may then preside in the Supreme Court, Essex County Circuit, for the empaneling of a jury drawn from the general panel for the purpose of assessing damages on the complaint in the above cause, pursuant to an order made in the above cause on September 10th, 1927.

Dated: November 19th, 1927.

RASKIN, HORNSTEIN & RUSKIN,
Attorneys of Plaintiffs.

Exhibits.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* ARTHUR BENNETT, doing business as GLOBE TAXI COMPANY, and CARROLL D. HENDERSON, *Defendants.*	Action at Law. NOTICE.

To:

THOMAS A. DAVIS, JR., Esq.,
Administrator *pendente lite* of the
estate of Arthur Bennett, deceased, and

BENJAMIN WILLIAM MILLER, Esq.,
Attorney of record for the said
Arthur Bennett, deceased.

Sirs:

TAKE NOTICE that on Saturday, the 19th day of November, 1927, at the Court House in the City of Newark, at ten o'clock in the forenoon or as soon as the said Court can attend to the same, we shall apply to Chief Justice of the New Jersey Supreme Court for an order substituting you, the said Thomas A. Davis, Jr., administrator *pendente lite* of the estate of the late Arthur Bennett, deceased, as a party defendant in the above entitled suit.

Dated: November 16th, 1927.

RASKIN, HORNSTEIN & RUSKIN,
Attorneys of Plaintiffs.

Exhibits.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ,
Plaintiffs,
vs.
THOMAS A. DAVIS, JR., Administrator of the estate of ARTHUR BENNETT, deceased,
Defendant.

POSTEA.

This case was tried before Judge William A. Smith and a jury at the Essex County Circuit on December 5th, 1927, to whom the same was referred by Chief Justice William S. Gummere by order dated November 19th, 1927; The jury having considered the evidence returned a verdict in favor of the plaintiff Herbert Migatz for the sum of Two Thousand ($2,000) Dollars;
and in favor of the plaintiff Loretta Migatz for the sum of Eight Thousand ($8,000.) Dollars
and against the defendant, Thomas A. Davis, Jr. Administrator of the Estate of Arthur Bennett, deceased.

Dated: Dec. 5th, 1927.

WM. A. SMITH
Circuit Court Judge.

Exhibits.

NEW JERSEY SUPREME COURT.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* THOMAS A. DAVIS, JR., Administrator of the estate of ARTHUR BENNETT, deceased, *Defendant.*	Action at Law. On Postea. RULE FOR FINAL JUDGMENT.

$2000.00 H.M.
8000.00 L.M.

10000.00
75.46

$ 10075.46

The damages of the plaintiffs having been assessed by a jury drawn from the general panel during its attendance at the Essex County Circuit under the direction of the Honorable William A. Smith, Circuit Court Judge to whom the same was referred, and it appearing that the jury returned a general verdict in favor of the plaintiff, Herbert Migatz, for the sum of Two Thousand ($2,000.) Dollars, and in favor of the plaintiff, Loretta Migatz, for the sum of Eight Thousand ($8,000.) Dollars, and against the defendant, Thomas A. Davis, Jr., Administrator of the Estate of Arthur Bennett, deceased.

Exhibits.

It is, on motion of Raskin, Hornstein & Ruskin, Attorneys of said Plaintiffs, Ordered that final judgment be entered in the above stated cause in favor of the plaintiff, Herbert Migatz, for the sum of Two Thousand ($2,000.) Dollars, and in favor of the plaintiff, Loretta Migatz, for the sum of Eight Thousand ($8,000.) Dollars, and against the defendant, Thomas A. Davis, Jr., Administrator of the Estate of Arthur Bennett, deceased, besides costs of suit to be taxed.

Let this rule be entered in the minutes.

James F. Minturn
Justice, New Jersey Supreme Court.

Entered this 13th day of December, 1927.
On motion of
Raskin, Hornstein & Ruskin,
Attys.

Exhibits.

NEW JERSEY SUPREME COURT.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* THOMAS A. DAVIS, JR., Administrator of the estate of ARTHUR BENNETT, deceased, *Defendant.*	Action at Law. On Postea. RASKIN, HORNSTEIN & RUSKIN, ATTORNEYS.

$ 2,000.00 H. M.
8,000.00 L. M.

$10,000.00
75.46

$10,075.46

Judgment entered this thirteenth day of December, A. D. nineteen hundred and twenty-seven against the defendant and in favor of Herbert Migatz, plaintiff, for the sum of two thousand dollars damages, and in favor of Loretta Migatz, plaintiff for the sum of eight thousand dollars damages and seventy-five dollars and forty-six cents costs.

WM. S. GUMMERE,
C. J.

Exhibits.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at
[seal] Trenton, this thirty-first day of May, A. D. nineteen hundred and twenty-eight.

Fred L. Bloodgood,
Clerk.

Exhibit P-2.

Execution.

New Jersey, ss. The State of New Jersey to our Sheriff of our County of Essex

We command you That of the goods and chattels, rights and
(seal) credits of Thomas A. Davis, Jr. Administrator of the Estate of Arthur Bennett, deceased defendant, in your County, you cause to be made the sum of Two Thousand Dollars damages recovered by Herbert Migatz plaintiff, and also the sum of Eight thousand dollars damages recovered by Loretta Migatz plaintiff, which the said plaintiffs, lately in our Supreme Court, at Trenton, before the Justices of our same Court, recovered against said defendant, and also Seventy-five dollars and forty-six cents which in our said Court, before the

Justices aforesaid, were adjudged to the said plaintiffs for their costs and charges by them about their suit in this behalf expended, whereof the said defendant is convicted, as appears of record; and if sufficient goods and chattels, rights and credits of the said defendant cannot be found in your County, whereof the damages and costs aforesaid may be made, then we further command you that you cause the whole, or the residue, as the case may require, of the said damages and costs to be made of the lands, tenements, hereditaments and real estate whereof the said defendant was seized on the thirteenth day of December nineteen hundred and twenty-seven, or at any time afterwards, in whose hands soever the same may be; and that you have those moneys before our Justices aforesaid, at Trenton aforesaid, on the third Tuesday in January next, to render unto the said plaintiffs for their damages and costs aforesaid, and have you then and there this writ.

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice, at Trenton aforesaid, the thirteenth day of December A. D. nineteen hundred and twenty-seven.

Raskin, Hornstein & Ruskin,
Attorneys

Edward J. Kelleher,
Clerk

ENDORSED

I hereby appoint and depute John J. McGonnell to serve the within writ.

Witness my hand and seal this 21 day of Dec. 1927.

Conrad Deuchler,
Sheriff,

By Alfred C. Walker,
Under Sheriff

Sheriff Fees $7.62 (Seal)
Paid 12/20/27

RECEIVED DEC. 20, 1927
AT 10:35 A. M.
CONRAD DEUCHLER,
Sheriff

UNSATISFIED

I can find neither goods, Chattels, Lands, Tenements, hereditaments, nor Real Estate of the Defendant within named in my County whereof to make the damages and Costs, of this writ or any part thereof.

Harry S. Huelsenbeck,
Sheriff.

Recorded in the office of the Clerk of the Supreme Court in A52 of Process, page 7.

Edward J. Kelleher,
Clerk.

A true copy
FRED L. BLOODGOOD,
Clerk.

Exhibits P-3 and P-4.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs*, *vs.* JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation, *Defendant*.	ACTION AT LAW. INTERROGATORIES AND ANSWERS.

To:

JERSEY MUTUAL CASUALTY INSURANCE COMPANY, Defendant, and

GEORGE F. SEYMOUR, JR., Esquire, Attorneys of Defendant.

DEAR SIRS:

PLEASE TAKE NOTICE that plaintiffs demand of the defendant answers, under oath, to the following interrogatories within ten days after service hereof upon you.

1. State whether a policy was issued by the defendant, Jersey Mutual Casualty Insurance Company, to Arthur Bennett, doing business as Globe Taxi Company, insuring his Shaw taxicab bearing New Jersey license for the year 1927, #0-1982-T, Engine #563V41252.

Ans. Yes.

2. Was said policy of insurance in force on or about March 27th, 1927?

Ans. Yes.

3. If your answer to the foregoing interrogatory is in the negative, when was liability under said policy determined?

Ans. See answer to No. 2.

4. What were the conditions which brought about the determinations of liability under said policy?

Ans. Liability not yet determined.

RASKIN, HORNSTEIN & RUSKIN,
Attorneys of Plaintiffs.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

ALEXANDER T. MORELLI, of full age, being duly sworn, according to law, upon his oath, deposes and says:

That he is employed by the Jersey Mutual Casualty Insurance Company in the capacity of Manager; that he is familiar with the matters and things contained in the above entitled suit and authorized to make the foregoing answers; that he has read the foregoing interrogatories and the answers thereto are in all respects true.

ALEXANDER T. MORELLI.

Sworn and subscribed to before me }
this 18th day of February, 1929. }

PAUL J. O'NEILL,
An Attorney at Law of N. J.

Exhibit P-5.

(Copy)

CERTIFICATE No. 3297

This certificate must be displayed in a conspicuous place within the vehicle herein described

THIS IS TO CERTIFY, that ARTHUR BENNETT
Street address 78-8th Avenue
City or Town Newark, N. J.

has filed with the Commissioner of Motor Vehicles, Policy No. 648 in the JERSEY MUTUAL CASUALTY INS. (Name of Company) covering SHAW CAB (Make of car).

Engine No. 563V41252 Serial No. .....

Registered under 192.... Registration No. O-4174 in accordance with the Provisions of Chapter 231 (or 249) P. L. 1926.

WM. L. DILL

Date Oct. 28, 1926.

Commissioner of Motor Vehicles.

Exhibits.

(Copy)

JERSEY MUTUAL CASUALTY INSURANCE COMPANY
Controlled by Taxi Owners
Federal Trust Building
24 Commerce Street
Newark, N. J.

May 23, 1927.

Joseph Desent, Pres.
Jesse Hendler, 1st V. Pres.
Samuel Steglitz, 2nd V. Pres.
Robert Wallace, Secretary.
Frank Kaul, Treasurer.
George F. Seymour, Jr. General Counsel.

DIRECTORS

Myndert Bonnema
George T. Marion
William V. Rule
Joseph Dunsky
Christian Jans
John N. Brennan
Zed S. Hastings.
Hon. William L. Dill,
Trenton, N. J.

Dear Sir:—

We would ask that you please return to this office policy No. 648, issued in the name of Arthur Bennett, 78-8th Avenue, Newark, N. J., as same is in order for cancellation.

Yours very truly,

JERSEY MUTUAL CASUALTY INSURANCE COMPANY
By ALEXANDER T. MORELLI, Manager.

Exhibits.

STATE OF NEW JERSEY

Department of Motor Vehicle Registration and Regulation

I, WILLIAM L. DILL, Commissioner of Motor Vehicles do hereby certify that the annexed is a true copy of Approval Certificate number 3297 issued by the Commissioner of Motor Vehicles on October 28th, 1926, to Arthur Bennett, of 78-8th Avenue, Newark, New Jersey, as the same is taken from and compared with the original record now remaining on file in my office. I do further certify that there is also attached a true copy of the notice of cancellation received in this office on May 24th, 1927, from the Jersey Mutual Casualty Insurance Company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at Trenton this eighth day of November, A. D. 1929.

WM. L. DILL
Commissioner of Motor Vehicles.

(Seal)

Exhibit P-6.

648

Auto-Cab Liability Policy

JERSEY MUTUAL

CASUALTY INSURANCE COMPANY

Newark, N. J.

(Hereinafter called the Company)

In consideration of the payment of premium of Two hundred and no/100 Dollars, hereby agrees to indemnify, Arthur Bennett of 78-8th Ave., Newark, N. J. hereinafter called the Assured, for a term of 12 months from the 1st day of October 1926, at noon, to the 1st day of October, 1927, at noon, against loss arising from the liability imposed by law upon the Assured for damages on account of bodily injuries or death suffered by any person or persons as a result of an accident occurring, while this policy is in force, by reason of the ownership, maintenance, or use of the auto cab hereinafter described, it being understood and agreed that the indemnity herein granted shall be in strict accordance with the provisions of Chapter 231, Laws of New Jersey, 1926, and that the Company shall not be liable for any loss sustained other than such loss as the Assured may sustain by reason of such ownership, maintenance and use of the within described auto-cab by virtue of the provisions of such Chapter; and to defend in the name and on behalf of the Assured any legal proceedings brought against the Assured to enforce a claim covered by this policy, whether groundless or not, for damages on account of such bodily injuries or death suffered or alleged to have been suffered as described above during the policy

period, unless the Company shall elect to effect settlement thereof.

THE LIABILITY of the Company for loss from any one judgment resulting in bodily injuries to or in the death of any one person is limited to FIVE THOUSAND DOLLARS ($5,000.00), and there shall be a continuing liability of the Company for such amount under this policy, notwithstanding any recovery thereunder.

DESCRIPTION OF AUTO-CAB INSURED

Trade Name—Shaw.
Model Year—1922.
Motor Number—563V41252.
Serial Number—none.
State License—
Municipal License—948.
Body Type—Cab.
Seating Capacity—5.

1. NOTICE, CLAIMS AND SUITS. The Assured shall give to the Company immediate written notice of any accident and shall also give like notice of claims for damages on account of such accidents. If any suit is brought against the Assured to recover such damages the Assured shall immediately forward to the Company at its home office in Newark, N. J., every summons or other process served upon him. The Company shall have the exclusive right to contest or settle any suits or claim. The Assured shall not interfere in any way respecting any negotiations for the settlement of any claim or suit, nor in the conduct of any legal proceedings, but shall, at all times, render to it all pos-

sible co-operation and assistance, and the Assured shall not voluntarily admit any liability for any accident.

2. Subrogation. In the event that the Company becomes liable for payment of loss under this policy, the Company shall be subrogated to the amount of such liability, to all rights of the Assured against any person, firm or corporation arising out of the accident causing such liability and the Assured shall do everything which may be necessary to secure to the Company such rights.

3. Cancellation. Either the Assured or the Company may cancel this policy at the end of any quarterly period by filing a notice of their intention so to do in the office of the Commissioner of Motor Vehicles of New Jersey, at Trenton, at least twenty days prior thereto, in which event future premiums shall thereupon cease and the Company shall not be liable to the Assured for the payment of any unearned portion of the premium already paid.

4. Statutory provisions. Upon acceptance of this policy the Assured becomes a Member of the Company and has the right to vote at its meetings as provided for in the By-Laws of the Company.

5. Assessments. In addition to the premiums provided for in this policy, the Assured agrees to pay such assessments as may be made by the Company in accordance with the Insurance Laws of the State of New Jersey and the By-Laws of the Company. The Assured's liability to assessment shall in no event be greater than an amount

equal to the amount of, and in addition to the cash premium written in this policy.

6. DIVIDENDS. The Board of Directors may, subject to the approval of the Commissioner of Banking and Insurance and the provisions of the Insurance Laws of the State of New Jersey, declare dividends at the end of each fiscal year, or more often, after retaining sufficient sums to pay all outstanding obligations.

IN WITNESS WHEREOF, JERSEY MUTUAL CASUALTY INSURANCE COMPANY has caused these presents to be signed by its President and Secretary, under its corporate seal, at Newark, New Jersey, the 1st day of October, 1926, but the same shall not be binding upon the Company, unless countersigned by its Authorized Manager.

WILLIAM A. PIGEL.
Secretary.

JOSEPH D. ESENT.
President.

COUNTERSIGNED:
ALEXANDER T. MORELLI
Authorized Manager.
[SEAL]

Postea.

(Filed Jan. 15, 1930.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and
LORETTA MIGATZ,
Plaintiffs,

vs.

JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation,
Defendant.

This case was tried before Judge Worrall F. Mountain and a jury to whom the same was referred for trial, at the Essex County Circuit on January 13 and 14, 1930, upon the pleadings and proofs produced, the Court directed the jury to return a general verdict in favor of the plaintiff Herbert Migatz for the sum of Two Thousand Dollars ($2,000.) and in favor of the plaintiff Loretta Migatz for the sum of Five Thousand Dollars ($5,000.) and against the defendant Jersey Mutual Casualty Insurance Company, a corporation, dated January 14, 1930.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

Rule for Final Judgment.

(Filed Jan. 17, 1930.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,* *vs.* JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation, *Defendant.*	ACTION AT LAW. ON POSTAE.

The damages of the plaintiffs having been assessed by a jury drawn from the general panel during its attendance at the Essex County Circuit Court, by the direction of the Honorable Worrall F. Mountain, Circuit Court Judge to whom the same was referred, and it appearing that the jury by the direction of the Court returned a general verdict in favor of the plaintiff, Herbert Migatz, for the sum of Two Thousand ($2,000.00) Dollars, and in favor of the plaintiff, Loretta Migatz, for the sum of Five Thousand ($5,000.00) Dollars, and against the defendant, Jersey Mutual Casualty Insurance Company, a corporation,

Rule for Final Judgment.

It is, on motion of Raskin, Hornstein & Ruskin, Attorneys of said Plaintiffs, Ordered, that final judgment be entered in the above stated cause in favor of the plaintiff, Herbert Migatz, for the sum of Two Thousand ($2,000.00) Dollars, and in favor of the plaintiff, Loretta Migatz, for the sum of Five Thousand ($5,000.00) Dollars, and against the defendant Jersey Mutual Casualty Insurance Company, a corporation, besides costs of suit to be taxed.

Let this Rule be entered in the minutes.

Dated this 16th day of
January, 1930, on motion of
Raskin, Hornstein & Ruskin.

Wm. S. Gummere,
Chief Justice, New Jersey
Supreme Court.

Notice of Appeal.

(Filed Feb. 28, 1930.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs,*	ACTION AT LAW.
vs.	
JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation, *Defendant.*	

To: Raskin, Hornstein & Ruskin, Esqs., Attorneys for Plaintiffs, or To Whom it May Concern:

Sirs:

PLEASE TAKE NOTICE That the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the Judgments entered in this cause.

Respectfully yours,

GEORGE F. SEYMOUR, JR.,
Attorney of Defendant.

(Served Feb. 27/30.)

Grounds of Appeal.

(Filed May 1, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

HERBERT MIGATZ and LORETTA MIGATZ, *Plaintiffs-Appellees,* *vs.* JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation, *Defendant-Appellant.*	ACTION AT LAW.

The defendant sets out the grounds for appeal as follows:

(1) The trial court erred in permitting the amendment of the complaint.

(2) The trial court erred in refusing to grant a non-suit.

(3) The trial court erred in refusing to direct a verdict in favor of the defendant.

(4) The trial court erred in directing a judgment in favor of the plaintiff, Herbert Migatz, in the sum of $2,000.00 and for the plaintiff, Loretta Migatz, in the sum of $5,000.00.

(5) The trial court erred in refusing a non-suit and in directing a verdict for the plaintiffs on the ground that there is nothing in the record to disclose that the judgment in the original action was the result of personal injuries sustained by reason of the ownership and operation of a taxicab in accordance with Chapter 231 of the Laws of 1926.

GEORGE F. SEYMOUR, JR.,
Attorney for Defendant-Appellant.

60

New Jersey Court of Errors and Appeals

HERBERT MIGATZ and LORETTA MIGATZ,
Plaintiffs-Appellees,

v.

JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation,
Defendant-Appellant.

BRIEF OF PLAINTIFFS-APPELLEES.

Statement.

Plaintiffs are husband and wife. On March 27th, 1927, they both sustained serious personal injuries as a result of an accident between an automobile in which they were passengers and the taxicab of Arthur Bennett, doing business as Globe Taxi Company. The accident occurred at the intersection of Waverly Avenue and Somerset Street, in the City of Newark, New Jersey, and the taxicab at the time of the collision was operated by one Carroll D. Henderson, a chauffeur in the employ of Arthur Bennett.

On or about May 19th, 1927, plaintiffs commenced suit against Arthur Bennett, doing business as Globe Taxi Company, and Carroll D. Henderson in the New Jersey Supreme Court (Essex County Circuit). The Sheriff was unable to serve the defendant, Carroll D. Henderson, and the suit proceeded against the defendant, Arthur Bennett,

the owner of the taxicab. An interlocutory judgment was entered against the defendant, Bennett, on July 12th, 1927, and an order of reference was made by Chief Justice GUMMERE for the assessment of damages by a jury drawn from the general panel at the Essex Circuit. Because of the death of the defendant, Bennett (after the entry of interlocutory judgment against him), an order was made, on notice, substituting Thomas A. Davis, Jr., administrator of the estate of the said Arthur Bennett, so that the damages be assessed. The damages were thereafter assessed by a jury, in accordance with the order of reference, and pursuant to notice given to both the substituted defendant and the defendant's attorney of record. After hearing the testimony and considering the proofs, the jury returned a general verdict in favor of the plaintiff, Herbert Migatz, for $2,000 and in favor of the plaintiff, Loretta Migatz, for $8,000. An execution was issued on the judgments entered on the said verdicts and said execution was returned wholly unsatisfied by the Sheriff of Essex County.

The present suit was commenced on or about May 25th, 1928, against the defendant-appellant herein to collect the foregoing judgments. The defendant's liability in the present suit was predicated upon the policy of insurance which it issued to Arthur Bennett (the defendant in the first suit) insuring the taxicab which figured in the accident causing the injuries to the plaintiffs. This policy of insurance was issued pursuant to the provisions of Chapter 231 of the Laws of New Jersey for the year 1926, and said policy was in full force and effect at the time of the accident. The case came on regularly for trial before Judge MOUNTAIN at the Essex Circuit, and resulted in a directed verdict in favor of the plaintiff, Herbert Migatz for $2,000 and in favor of the plaintiff, Loretta Migatz,

for $5,000. From the judgment entered on these verdicts, the present appeal is taken.

The appellant herein filed five separate grounds of appeal. The first ground is not argued in the brief and we therefore consider it abandoned. The four remaining grounds of appeal have been consolidated under three heads, and our argument herein is directed to the issues raised by these three points in the same order as printed in the appellant's brief.

ANSWER TO POINT I.

The pleadings and proofs in both cases conclusively show that the personal injuries sustained by the plaintiffs were the result of the ownership and operation of the taxicab which the appellant herein insured.

Paragraph One of the complaint filed in the original suit alleged ownership by Arthur Bennett, the defendant in that suit, of a Shaw yellow taxicab, bearing New Jersey license for the year 1927, O-1982-T.

Paragraph Two of the said complaint alleged that the plaintiffs, Herbert Migatz and Loretta Migatz, were passengers in an automobile operated by the plaintiff, Herbert Migatz, and were proceeding easterly along Waverly Avenue at or about a point where the said Waverly Avenue intersects Somerset Street, and were crossing said intersection (Case, p. 37, lines 30 to 38).

Paragraph Three of the said complaint alleged that the defendant, Arthur Bennett, at or about said time, by his servant and agent, the defendant, Carroll D. Henderson, operated and drove his

said taxicab northerly along said Somerset Street, at a high and excessive rate of speed * * * severely and painfully injuring both plaintiffs (Case, p. 37, lines 38 to 42; p. 38, lines 1 to 10).

The complaint in the second suit appears in the state of case at page two. Paragraph One thereof alleges as follows:

> "1. On or about March 27th, 1927, *IN THE CITY OF NEWARK, IN THE COUNTY OF ESSEX AND STATE OF NEW JERSEY,* they were injured by a SHAW YELLOW TAXICAB, bearing New Jersey license for the year 1927, O-1982-T, engine #563V41252, the property of one Arthur Bennett, doing business as GLOBE TAXI COMPANY" (Case, p. 2, lines 25 to 31).

Paragraph Two of the same complaint alleges that:

> "2. That on May 19th, 1927, a suit at law for damage for said injuries was filed in the New Jersey Supreme Court, Essex County Circuit, by the plaintiffs herein against the said Arthur Bennett, doing business as GLOBE TAXI COMPANY * * *."

In addition thereto, the plaintiffs offered as part of their main case in the present suit from which this appeal is taken, certain interrogatories and the sworn answers thereto of the defendant-appellant herein, which were received in evidence by the Court without objection from the defendant-appellant, and were marked respectively Exhibits P-3 and P-4 (Case, p. 11, lines 5 to 10). These interrogatories and the answers thereto are printed at length at pages 55 and 56, and were as follows:

> "1. State whether a policy was issued by the defendant, Jersey Mutual Casualty Insurance Company, to Arthur Bennett, doing business as Globe Taxi Company, insuring his

Shaw taxicab bearing New Jersey license for the year 1927, O-1982-T, engine #563V41252.
Ans. Yes.

2. Was said policy of insurance in force on or about March 27th, 1927?
Ans. Yes.

3. If your answer to the foregoing interrogatory is in the negative, when was liability under said policy determined?
Ans. See answer to No. 2.

4. What were the conditions which brought about the determination of liability under said policy?
Ans. Liability not yet determined."

In addition to the foregoing there was offered in evidence (Case, p. 11, line 12) a certified copy of a certificate issued by the Commissioner of Motor Vehicles, certifying that Arthur Bennett of No. 78 Eighth Avenue, Newark, New Jersey, had filed with the Commissioner of Motor Vehicles policy No. 648 in the Jersey Mutual Casualty Insurance Company, Inc., covering Shaw Cab engine No. 563V41252, serial No. , registered No. 01474, in accordance with the provisions of Chapter 231 (or 249) of the Pamphlet Laws of 1926, dated October 28th, 1928, and signed by William L. Dill, Commissioner of Motor Vehicles. The appellant herein offered no objection to the admission of said certificate, the purport of which clearly indicated the nature of the vehicle which was registered with the Commissioner of Motor Vehicles as a taxicab and insured as such by the appellant herein (Case, p. 11, line 29).

The plaintiffs, as part of their main case, also offered, and the Court received in evidence, the original policy of insurance (Case, p. 15, lines 14 and 15). The policy was received in evidence without objection from the appellant (Case, p. 15,

lines 14 and 15), is marked Exhibit P-6, and is printed at page 60. An examination of the pertinent section of Exhibit P-6 (Case, p. 61, lines 13 to 25), clearly indicates that the automobile insured was a Shaw automobile with a cab body having a seating capacity for five, and licensed by the municipality to operate as a taxicab.

It appears conclusively from the pleadings and proofs, therefore, that the automobile which caused the injuries to the plaintiffs was a taxicab licensed by the municipality to operate as such under the provisions of Chapter 231 of the Laws of New Jersey for the year 1926, and that the plaintiffs were injured in the City of Newark, in the County of Essex and State of New Jersey. These material facts were neither denied by the appellant's answer nor was any proof offered at the trial to rebut the legal inferences and presumptions which were created by the proofs offered; nor was the point raised by the separate defenses filed to the suit.

Furthermore, it is elementary, that every material allegation which is not denied, is deemed to be admitted. It follows, therefore, that in the absence of a direct denial raising the issue, that the auto-cab which figured in the accident possessed the characteristics of a taxicab as defined by the statute in question.

The appellant in his brief, questions the fact that the accident occurred in the State of New Jersey, and in the same breath admits that plaintiffs could probably prove the fact to be that the accident did occur in New Jersey. Notwithstanding this claim on the part of appellant, we desire to point out that the first paragraph of the complaint in the present suit, distinctly alleges that the plaintiffs were injured in "THE CITY OF NEWARK, IN THE COUNTY OF ESSEX AND

STATE OF NEW JERSEY" (Case, p. 2, line 25, *et seq.*). This fact was not questioned in the Court below, nor was it put in issue by the pleadings. Moreover, a careful reading of the statute (Chap. 231, P. L. 1926), fails to disclose that the policy issued in accordance therewith was intended to apply to accidents occurring only on the highways within the borders of the State of New Jersey. The intention and construction are, rather, that the act shall apply to those engaged in that business in New Jersey and whose vehicles operate under New Jersey registration.

The transcript of the pleadings in the original suit were offered and received in evidence (Case, p. 9, lines 40 and 41; p. 10, lines 5 to 7). This transcript was received without objection (Case, p. 10, line 8), is marked Exhibit P-1, and is printed at page 36. The fact that judgment in that action was rendered in favor of the plaintiffs results in the legal conclusion that the appellant's assured did own and operate the said taxicab and that the injuries sustained were the result of such ownership and operation and is *res adjudicata.* Furthermore, the contention of the appellant that the taxicab was not being operated as a taxicab was not raised by its answer or separate defenses, nor was there any proof offered to sustain its point.

Our Supreme Court, in the case of *Fox* v. *Great Atlantic, etc. Tea Co.,* 84 N. J. L. 726, 87 Atl. 379, held that:

> "A motion for nonsuit admits the truth of the plaintiff's evidence and of every inference of fact that can be legitimately drawn therefrom, but denies its sufficiency in law."

This pronouncement has been sustained and cited with approval in a long line of cases, the latest decision thereon being reported in 149 Atl.

Rep., page 826 (Atl. Adv. Sheets for May 17th, 1930).

In the case of *Connell* v. *Commonwealth Casualty Co.*, 96 N. J. L. 511, the Court, in construing a statute containing provisions similar to the provisions of Chapter 231, held that:

> "The vehicle lost none of its characteristics as a jitney bus, because it was without passengers at the time, or because its movements were directed to Brooklyn to engage in the passenger service there. Whether at rest or in operation, or in the act of undergoing reparation, on the municipal route or apart from it, it still retained its passenger characteristics as a jitney bus under the policy of insurance, *so far as the general public were concerned.* Any violation of the provisions of the Jitney Act was a matter between the operator and the municipalities under whose license he was operating. But while the policy of insurance remained in force, its legal effect as an indemnity to the traveling public, for whose benefit it was executed and exists, cannot be minimized by any extraneous act or default of the insured, so long as he is conducting the vehicle within the general scope of the purpose for which the jitney car was insured." (Citing *Gillard* v. *Manufacturers Insurance Co.*, 93 N. J. L. 215.)

The appellant in his brief on page seven, contends that there is no allegation that the taxicab which Arthur Bennett owned was a taxicab being operated pursuant to Chapter 231 of the Laws of 1926.

The Court, we believe, will take judicial notice of the fact that in addition to the exhibits there is undisputed proof that the automobile of Bennett was operating as a taxi from the fact that it was licensed as a taxi by the Commissioner of Motor Vehicles, its license for the year 1927 being O-1982-T (State of Case, p. 10, lines 26 to 33).

Exhibit P-5 (Case, p. 57) is a certificate issued by the Commissioner of Motor Vehicles certifying that Arthur Bennett is the owner of a taxicab which is registered for operation in accordance with the provisions of Chapter 231 (or 249) Pamphlet Laws 1926.

A reading of the complaint and the exhibits introduced in this present suit, and which are in evidence, clearly indicates that the auto-cab which caused the injuries possessed the characteristics of a taxicab as defined in Chapter 231 of the Laws of New Jersey for the year 1926, and that the accident occurred in the State of New Jersey, and also that it arose by reason of its ownership and operation as a taxicab. The burden of rebutting the legal inferences which can be drawn from the plaintiffs' evidence in the posture in which it stood at the time a motion was made for a nonsuit, made it obligatory upon the appellant to show by affirmative proof that it was not liable under the policy for the reason urged in Point I of the brief. ~~Not only was~~ no SUCH proof WAS offered, ~~but the point here made was not raised in the Court below,~~ and we respectfully urge that fact as a ground for refusal to consider Point I as ground for reversal.

ANSWER TO POINT II.

The Court did not err in denying the appellant's motion for a nonsuit and did not err in denying appellant's motion to direct a verdict in its favor.

The reasons which moved the Court to deny the appellant's motion for a nonsuit are clearly set forth in the state of fact commencing at page 24, line 30, and ending at page 27, line 7.

In answer to the point raised with respect to the substitution of an administrator as not being in accordance with the terms of the policy, we desire to point out that interlocutory judgment was entered against Bennett on July 12th, 1927 (Case, p. 42, lines 33 and 34), and that the defendant, Bennett, was still alive at that time. It further appears from the order admitting the administrator to defend the suit that Bennett did not die until September 9th, 1927 (Case, p. 45, lines 20 and 21). The judgment was against Bennett personally and not against his administrator or representatives, and the administrator was substituted for the purpose only of notice of an application to assess damages. Furthermore, we respectfully urge that Chapter 231 of the Laws of 1926 is a law affected with a public interest and was enacted for the benefit of the public, and its plain intendment should not be defeated by the death of the assured. The insurance policy in dispute is an instrument of public policy and vests an undeniable right in one who recovers a judgment against another indemnified by such policy, to hold the insurance company directly. This may be likened to the doctrine of subrogation in that any and all rights existing in such policy vest in the successful claimant for personal injuries. Any construction of such policy diminishing or disparaging the rights of such claimant are in the nature of a forfeiture.

In the case of *Melick* v. *Metropolitan Insurance Co.*, 84 N. J. L. 439, the Court said:

> "'It has become a settled rule in the construction of contracts of insurance,' said Mr. Justice DEPUE, in *Carson* v. *Jersey City Insurance Co.*, 14 Vroom, 300, 'that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed

> most strongly against the insurer and will never be extended beyond the strict words of the policy.' This language is quoted with approval in the opinion delivered in the Court of Errors and Appeals in the case of *Hampton* v. *Hartford Fire Insurance Co.*, 36 *Id.* 265, with the additional declaration: 'The Court will never seek for a construction of a forfeiture clause in a policy which will sustain it, if one which will defeat it is reasonably deducible from the terms and words used to express it.' In *Snyder* v. *Insurance Company*, 30 *Id.* 544, it was said: 'Policies of insurance against fire are taken out by all classes of people, educated and uneducated, and no rule of law is more salutary than that conditions in these instruments expressed in terms ambiguous and capable of misleading shall not be allowed to avoid the contract.' In the more recent case of *MacKinnon* v. *Fidelity and Casualty Co.*, 43 *Id.* 29, it is pointed out that 'the doctrine upon this subject arises from the relative position of the parties. * * *'"

In the case of *Hampton* v. *Hartford Fire Insurance Co.*, 65 N. J. L. 267, the Court said:

> "Forfeitures of this class are not favored in the law. The rule as to them in our state is settled. Our courts say: 'It has become a settled rule in the construction of contracts of insurance, that policies of insurance will be liberally construed to uphold the contract; and conditions contained in them which create forfeitures will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy.'" *Carson* v. *Jersey City Insurance Co.*, 14 Vroom, 300; *Snyder* v. *Insurance Co.*, 30 *Id.* 544.

Furthermore, we contend that the judgment is a personal one against Bennett, the person whose taxicab the appellant insured, that the assessment of damages was a mere formality or incident in the case, and that his liability under the policy was

determined in his lifetime. The actual assessment of damages was a mere computation of the amount due from him and his death should in no way defeat recovery.

~~We have carefully examined the state of case and fail to find anywhere the precise issue raised by Point II in the appellant's brief, either as a ground for a nonsuit or for the direction of a verdict. It is here raised for the first time, and we respectfully submit that not having been made a ground for nonsuit or direction of verdict, it should not be considered.~~

ANSWER TO POINT III.

The liability of the insurance company is not limited to $5,000.00.

The original policy of insurance upon which the liability of the appellant herein was predicated was produced by the appellant under subpoena. It was offered as part of the plaintiff's case, and admitted in evidence (Case, p. 15, lines 14 and 15), and is printed at page 60. The pertinent portion of the policy concerning the liability of the appellant will be found at page 61 of the State of Case, lines 7 to 13, and reads as follows:

> "The liability of the Company for loss from any one judgment resulting in bodily injuries to or in the death of any one person is limited to Five Thousand ($5,000.00) Dollars, and there shall be a continuing liability of the Company for such amount under this policy, notwithstanding any recovery thereunder."

In the original suit both plaintiffs were joined in the one action, but under separate causes of action. Each requested a separate verdict and the judgments entered in said case were separate and

distinct judgments. The plaintiff, Loretta Migatz, demanded Seventy-five Thousand ($75,000.00) Dollars damages (State of Case, p. 38, lines 27 and 28). The plaintiff, Herbert Migatz, demanded Twenty-five Thousand ($25,000.00) Dollars damages (State of Case, p. 38, lines 13 and 14). The Practice Act of 1912 provides that all persons claiming an interest in the subject of the action and in obtaining the judgment demanded, whether jointly or severally or in the alternative, may join as plaintiffs. Any persons interested in separate causes of action may join as plaintiffs if the causes of action have a common question of law or fact and arose out of the same transaction. Pamphlet Laws of 1912, page 378, section 4, and cases cited thereunder. This rule applies to tort as well as contract actions. Supreme Court Rules (1919 No. 211).

It is therefore apparent that the judgments obtained in the original action are two separate and distinct recoveries. Thus construing the clause in the policy as the trial court did, limiting the amount of Five Thousand ($5,000.00) Dollars under any one judgment, the two recoveries in the original action and also in the instant case, were proper. The clause itself specifically states that the liability shall extend "For Loss From Any One Judgment" to the amount of Five Thousand ($5,000.00) Dollars.

Assuming for the purpose of argument that the recovery is to be considered as one judgment, the Court's direction of a verdict in favor of each plaintiff is still within the comprehension of the plain language of the policy, which reads as follows:

> "The liability of the Company for loss from any *ONE* judgment resulting in bodily injuries

> to, or in the death of any *ONE PERSON* is limited, etc."

The above provision of the policy is clearly within the plain intendment of the statute, which provides:

> "Such insurance policy shall provide for the payment of *any* final judgment recovered by *ANY PERSON* on account of the ownership, maintenance, etc."

No apparent ambiguity exists in the language of the policy. Its verbiage is clear and to the point. It limits its liability for loss from any *ONE* judgment resulting in bodily injuries to or in the death of any *ONE* person to Five Thousand ($5,000.00) Dollars, and we respectfully maintain that the construction placed thereon by the trial court is the correct construction. However, should the Court consider that an ambiguity exists we contend that the construction to be placed upon it should be strictly against the appellant and in favor of the plaintiffs. In the leading case of *Smith & Wallace Co.* v. *Lunger,* 64 N. J. L. 541, the Court held:

> "The general rule of law undoubtedly is that the construction of written contracts devolves upon the court as a matter of law. It follows that the meaning of the words employed in the contract must be ascertained and determined by the court as a matter of law."

In *Sommer Faucet Co.* v. *Commercial Casualty Co.,* 89 N. J. L. 695, the Court said:

> "The construction and effect of a written instrument is a matter of law to be determined by the court and not by the jury. This rule of law is firmly settled in this court by a long line of cases."

The trial court properly exercised its function in determining the construction of the ambiguity and in the absence of a clear abuse of discretion, such construction may not be appealed from.

Furthermore, a long series of cases hold that in construing the meaning of an insurance policy, if doubt arises, the benefit of that doubt must always be given to the assured.

In the case of *Connell* v. *Commonwealth Casualty Co.*, 96 N. J. L. 511, the Court said:

> "The rule of interpretation and construction is of course fundamental, that the meaning of the instrument must be gathered from its provisions as a whole, and that if doubt arise upon such perusal, the benefit of the doubt must be given to the insured." *Harris* v. *American Casualty Co.*, 83 N. J. L. 641; *Bohles* v. *Prudential Insurance Co.*, 84 *Id.* 315.

In the case of *Bennett* v. *Van Riper*, 47 N. J. Eq. 566, the Court said:

> "Where there is no fixed legal or technical meaning which the court must follow in the construction of a contract, then 'the best construction,' says Chief Justice GIBSON, 'is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention.'"

In the case of *Maryland Casualty Co.* v. *Hanlon*, 87 N. J. Eq. 172, the Court said:

> "If the contract is ambiguous, it should be construed more favorably to the defendant."
>
> "The complainant is a surety company engaged in business for profit, in which the risks are carefully calculated, and the pre-

mium fixed at a figure to make the business commercially profitable; the bonds, applications and other instruments are carefully prepared by their counsel for their protection; for which reasons it has been held that if the instruments are susceptible of different meanings, that one should be adopted which is favorable to the other party."

American Surety Co. v. *Pauly,* 170 U. S. 133;

Tebbets v. *Mercantile Credit Co.,* 19 C. C. A. 281; 73 Fed. Rep. 95; Brandt S. & G. (3d ed.), Sec. 15.

As a matter of fact and as an incident of good business, an owner of a taxicab of substantial financial worth would certainly be placing himself in great jeopardy if he only filed a policy for five thousand ($5,000.00) dollars because if judgments were recovered as a result of personal injuries to more than one person arising from an accident caused by a taxicab he would become personally responsible for the excess of the judgments above the amount of five thousand ($5,000.00) dollars. There is certainly nothing in the Act which prohibits or in any way restricts the filing with the Commissioner of Motor Vehicles of a policy for an amount of indemnity greater than that provided by the law and the policy of insurance issued by the appellant herein expressly provides that "it shall be liable to the amount of five thousand ($5,000.00) dollars to any ONE person under any one judgment." There being two separate persons involved, the liability of the company under its policy is clear, and the verdicts directed for each in the Court below should be affirmed.

For the several reasons above stated, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

RASKIN & HORNSTEIN,
Attorneys of Plaintiffs-Appellees.

ISIDORE HORNSTEIN,
Of Counsel.

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New Jersey Court of Errors and Appeals

HERBERT MIGATZ and LORETTA MIGATZ,
Plaintiffs-Appellees,

v.

JERSEY MUTUAL CASUALTY INSURANCE COMPANY, a corporation,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT.

Statement.

This is an appeal from a judgment directed by the Court in favor of the plaintiff, Herbert Migatz, in the sum of $2,000.00 and in favor of the plaintiff, Loretta Migatz, in the sum of $5,000.00 against the defendant insurance company upon its policy insuring one Arthur Bennett, the owner of a taxicab, which policy was issued to comply with the Taxicab Act known as Chapter 231, Laws of New Jersey, 1926. The action against this defendant insurance company was brought by reason of an unsatisfied judgment which the plaintiffs had heretofore obtained against the Administrator of the estate of Arthur Bennett, deceased, by default, and as a result of an assessment of damages which resulted in a verdict in favor of the plaintiff, Herbert Migatz, in the sum of $2,000.00 and the plaintiff, Loretta Migatz, in the sum of $8,000.00 (Postea, Case, p. 48).

Facts.

Arthur Bennett, the taxicab owner, obtained from the defendant company a policy of insurance (Exhibit P-6, Case p. 60), whereby the defendant insurance company did insure the said Arthur Bennett from October 1, 1926, to October 1, 1927, against loss arising from the liability imposed by law upon the assured for damages suffered by any person or persons as the result of an accident occurring by reason of the ownership, maintenance or use of the autocab, the indemnity of the insurance company to be in strict accordance with the provisions of Chapter 231, Laws of New Jersey, 1926 (Case, p. 60, lines 25-33).

Plaintiffs were injured by reason of a collision of their automobile with an automobile which bore the license number of the taxicab owned by Arthur Bennett. They did thereupon bring an action in the Supreme Court, Essex Circuit, against Arthur Bennett and merely alleged in their complaint that Arthur Bennett was the owner of a yellow taxicab bearing a certain license number and that on or about March 27, 1927, the plaintiffs were proceeding in an automobile easterly along Waverly Avenue at or about a point where said Waverly Avenue intersects Somerset Street, when the said Arthur Bennett, operating an automobile by his agent along said Somerset Street, negligently collided with the plaintiffs' automobile resulting in their sustaining injuries. The complaint does not state that Bennett's car was used, operated or maintained as a taxicab under the provisions of Chapter 231, Laws of New Jersey, 1926, nor does it appear that the streets in question were streets anywhere in the State of New Jersey. An answer was filed on behalf of Arthur Bennett by an attorney who filed the answer a day or two late. There-

after the plaintiffs entered a rule for interlocutory judgment and obtained an order of reference for the assessment of damages. The order of reference (Case, p. 43), was made on September 12, 1927. Subsequent to the obtaining of this order of reference and on November 19, 1927, an order was made substituting Thomas A. Davis, Jr., Administrator of the Estate of Arthur Bennett, in the place and stead of Arthur Bennett, deceased (Case, p. 45), which order recites that Arthur Bennett died on September 9, 1927. A judgment thereafter was obtained as the result of the assessment of damages in favor of the plaintiff, Herbert Migatz, in the sum of $2,000.00 and in favor of the plaintiff, Loretta Migatz, in the sum of $8,000.00, and against Thomas A. Davis, Jr., Administrator of the Estate of Arthur Bennett, deceased (Postea, Case, p. 48). This judgment was thereafter returned unsatisfied and thereupon the plaintiffs brought this action against the defendant insurance company by reason of the judgment which they had previously obtained.

The complaint in the present action alleges that a judgment had been obtained against Arthur Bennett when, as a matter of fact, the judgment was obtained against Thomas A. Davis, Jr., Administrator of the Estate of Arthur Bennett, deceased (Paragraph 2 of the Complaint, Case, p. 2). The complaint further alleges in Paragraph 6 that the defendant company did, on January 1, 1927, insure Arthur Bennett from any loss not exceeding $5,000.00 for injuries or death of one person and $10,000.00 for injuries or death of two persons, whereas the policy simply has a coverage of $5,000.00. The complaint then alleges that by reason of the unsatisfied judgment and insolvency of the estate, the defendant company is liable to the plaintiffs for the full amount of the judgments which they have heretofore obtained by reason of the accident.

The plaintiffs' case consisted of the introduction into evidence of the transcript of the proceedings brought in the original action and the identification of the automobile as the taxicab which the defendant company did insure. Their proofs, however, disclose that the policy of insurance was not entered into on January 1, 1927, but bore the date of October 1, 1926. Moreover, the policy of insurance did not provide for any liability on the part of the defendant in the sum of $5,000 for the injury to one person and for $10,000 for injuries to more than one person. The limit of liability of the insurance company is contained in the following provision (Case, p. 61):

> "The liability of the Company for loss from any one judgment resulting in bodily injuries to or in the death of any one person is limited to Five Thousand Dollars ($5,000.00), and there shall be a continuing liability of the Company for such amount under this policy, notwithstanding any recovery thereunder."

The Court however permitted an amendment to the complaint as to the date when the policy was issued and as to the amount of liability under the policy.

At the close of the plaintiffs' case, a motion was made for a nonsuit based not only upon the variance of the pleadings and the proof, but also upon the more important ground that nowheres does it appear that the plaintiffs suffered injuries which arose as a result of an accident occurring by reason of Arthur Bennett's ownership, maintenance or use of an autocab or taxicab, which taxicab was being operated pursuant to Chapter 231, Laws of New Jersey, 1926. Nor was there any evidence that the defendant's indemnity arose out of a cause of action in strict accordance with the provisions of Chapter 231, Laws of New Jersey, 1926. The

Court denied the motion for a nonsuit and at the close of the plaintiffs' case, the defendant moved for a direction of a verdict in favor of the defendant upon the same grounds upon which the motion for nonsuit was based, and upon the further ground that the judgment in the original action was against the Administrator of the Estate of Arthur Bennett, deceased, and that the policy of insurance was a personal contract between the insurance company and the insured and not with his estate; also upon the further ground that there was nothing in the record and postea to show that the verdict was the result of personal injuries sustained by reason of ownership and operation of the taxicab in accordance with Chapter 231 of the Laws of New Jersey, 1926. The Court declined to direct the verdict in favor of the defendant, but did direct a verdict in favor of the plaintiff Herbert Migatz, in the sum of $2,000.00 and in favor of the plaintiff Loretta Migatz, in the sum of $5,000.00 against the defendant insurance company. It is from these judgments that an appeal was taken to this Court.

We respectfully urge upon this appeal:

(1) Neither the pleadings nor the proofs in both of the cases in which the judgments were obtained disclose that the autocab which caused the injuries possessed the characteristics of a taxicab as defined in Chapter 231 of the Laws of New Jersey, 1926, or that the accident occurred upon any of the streets in the State of New Jersey.

(2) The Court erred in denying the motion for a nonsuit and in the denial of defendant's motion to direct a verdict in its favor.

(3) The liability of the insurance company is limited to $5,000.00.

POINT I.

Neither the pleadings nor the proofs in both of the cases in which the judgments were obtained disclose that the autocab which caused the injuries possessed the characteristics of a taxicab as defined in Chapter 231 of the Laws of New Jersey, 1926, or that the accident occurred upon any of the streets in the State of New Jersey.

The plaintiffs originally brought an action against Arthur Bennett for injuries received by reason of the collision of a taxicab owned by Arthur Bennett with their automobile. A summary of the allegations of each paragraph of the complaint is as follows (Complaint, Case, p. 37):

> Paragraph 1 alleges that Arthur Bennett on March 27, 1927, was the owner of a yellow taxicab bearing a New Jersey license.
>
> Paragraph 2 alleges on said date the plaintiffs' automobile was proceeding easterly along Waverly Avenue at the intersection of Somerset Street.
>
> Paragraph 3 alleges that the taxicab of Arthur Bennett was being operated along Somerset Street at a high rate of speed and carelessly collided with the plaintiffs' automobile.
>
> Paragraph 4 alleges plaintiff, Loretta Migatz, suffered injuries.

The Second Count repeats the allegations of the First Count, but contains another cause of action in favor of the plaintiff, Herbert Migatz, for his injuries and for the loss of the consortium of his wife.

The judgment so obtained by the plaintiffs was procured by default. The judgment however is

based upon the pleadings in the case and rests entirely upon the allegations therein contained. It is therefore important that the complaint upon which the plaintiffs based their action be carefully considered in order that it may be determined whether the judgment obtained is such a judgment upon which the present action can be predicated against the insurance company upon its policy of insurance.

A careful examination of the complaint will disclose that the judgment is based upon a cause of action which merely alleges that one Arthur Bennett owned a taxicab bearing a New Jersey license for the year 1927, and that while being operated along Somerset Street collided with the plaintiffs' automobile which was proceeding along Waverly Avenue at a point where that street intersects Somerset Street. There is no allegation that Waverly Avenue or Somerset Street are streets in Newark, New Jersey, or are streets which are situated anywheres within the State of New Jersey. There is no allegation that the taxicab which Arthur Bennett owned was a taxicab being operated pursuant to Chapter 231 of the Laws of New Jersey, 1926. There is nothing in the complaint that the autocab or taxicab owned or operated by Arthur Bennett was engaged in the business of carrying passengers for hire or that it was held out, announced or advertised to operate or run or which was operated or run over any of the streets or public highways of this state and particularly that it accepted and discharged such persons as may offer themselves for transportation from points or places to points or places within or without the state.

Chapter 231 of the Laws of New Jersey, 1926, which is commonly known as the Taxicab Act, makes it a condition precedent that before a taxi-

cab may be operated, the owner must file an insurance policy in the sum of $5,000.00 against loss "from the liability imposed by law upon the autocab owner for damages on account of bodily injury or death suffered by any person or persons as a result of an accident occurring by reason of the ownership, maintenance or use of such autocab upon any public street." The statute further defines an autocab as used in said act as follows (Laws of New Jersey, 1926, p. 383):

> "1. The words "auto cab" as used herein shall mean and include any automobile or motor car, commonly called taxi, engaged in the business of carrying passengers for hire which is held out, announced or advertised to operate or run or which is operated or run over any of the streets or public highways of this State, and particularly accepts and discharges such persons as may offer themselves for transportation from points or places to points or places within or without the State."

It is only such a taxicab which the defendant company by its policy of insurance (Exhibit P-6), insured, because by its very provisions the defendant company made it a condition of its contract that the indemnity shall be in strict accordance with the provisions of Chapter 231, Laws of New Jersey, 1926, and provided further "that the company shall not be liable for any loss sustained other than such loss as the assured may sustain by reason of such ownership, maintenance and use of the within described autocab by virtue of the provisions of such Chapter." It is manifest that this policy of insurance indemnifies Arthur Bennett from any loss he shall sustain by reason of injuries for which he may be responsible by reason of the ownership and operation of that taxicab in accordance with the Taxicab Act, and an injured person may recover from the insurance company

a judgment recovered by such person against the taxi owner, provided the recovery of such injured person is based upon the ownership and operation of a taxicab pursuant to Chapter 231 of the Laws of New Jersey, 1926.

The law has been well settled in this state that insurance companies become liable to injured persons upon a policy of insurance issued to a taxicab owner or jitney bus owner.

> *Nellie Connell, Admx.* v. *Commonwealth Casualty Co.*, 96 N. J. L. 510.

An examination of that case, however, discloses that the Court has determined that the legal effect of a policy of insurance to the traveling public is that such policy acts as an indemnity to the traveling public so long as the owner of the vehicle conducts the same "within the general scope of the purpose for which the jitney car was insured." To quote from Justice MINTURN'S opinion (pp. 511-512):

> "But while the policy of insurance remained in force, its legal effect as an indemnity to the traveling public, for whose benefit it was executed and exists, cannot be minimized by any extraneous act or default of the insured, so long as he is conducting the vehicle within the general scope of the purpose for which the jitney car was insured. Gillard *v.* Manufacturers Insurance Co., 93 N. J. L. 215."

The clear intent of both the policy of insurance in this case and of the decisions in the jitney cases is that an insurance company which issues its policy of insurance shall be liable where the jitney bus or taxicab *is operated as a jitney bus or taxicab* in the State of New Jersey.

The difficulty, however, with the plaintiffs' judgment which they obtained in the original action is that the judgment so obtained by default does

not disclose that said judgment was based upon a cause of action which was brought by reason of bodily injuries sustained by the plaintiffs through the ownership or operation by Arthur Bennett of an autocab, commonly known as a taxicab, which was being operated in the State of New Jersey, as described in the Taxicab Act of 1926. An allegation that Arthur Bennett was the owner of a taxicab does not necessarily imply that at the time of the injury, Arthur Bennett owned and operated an autocab which had the characteristics of a taxicab as defined and described in Chapter 231 of the Laws of New Jersey, 1926. There is no allegation that the autocab was engaged in the business of carrying passengers for hire; no allegation that it was held out, announced or advertised to operate or run over the streets of this state, nor is there any allegation that the taxicab or the owners thereof accepted and discharged persons as they offered themselves for transportation in the State of New Jersey. Moreover, the allegation that Arthur Bennett was the owner of a taxicab does not necessarily mean that the taxicab at the time that the injuries were sustained was being operated as a taxicab in the streets of the State of New Jersey. For all it appears it may have been used as a private vehicle and as a private conveyance and not at all used or operated for taxicab purposes. Nor can there be any implication that the vehicle "was being conducted within the general scope of the purpose for which the taxicab was insured," which is the law as laid down in the *Connell* case, *supra.*

It may be true that the plaintiffs could have produced testimony or proof of these facts at a trial if their action were contested, but in their action, their judgment was obtained *by default* and their judgment is based solely upon the allegations as

made by them in their complaint. The judgment which they had obtained by default may, of course, be valid and operative as against Arthur Bennett, but when they are seeking to impose a liability upon an insurance company which has made a contract of indemnity with their defendant, they are bound to establish those facts upon which they can base liability against the insurance company; and liability against the insurance company can only be predicated upon a judgment obtained against its assured by reason of the ownership or operation of a taxicab pursuant to Chapter 231 of the Laws of New Jersey, 1926.

Having recovered a judgment in their previous action and the judgment having been returned unsatisfied, plaintiffs have now brought suit against the insurance company upon the insurance policy or contract of indemnity issued to the insured, Arthur Bennett. The only proof which they presented in addition to identifying the vehicle as covered by the insurance policy, was a transcript of the pleadings in the prior action. They, therefore, base their entire action against this defendant upon a judgment which they had previously obtained, which judgment was obtained by default upon a complaint setting out their cause of action; but their cause of action fails to disclose that the accident they complain of was the result of the ownership by Arthur Bennett of an autocab or automobile commonly known as a taxicab which, under the provisions of Chapter 231 of the Laws of New Jersey, 1926, was a taxicab engaged in the business of carrying passengers for hire or that it was held out or advertised to operate or run on any of the streets or public highways of this state or that it accepted and discharged any persons for transportation within or without this state. The failure to have alleged these important facts which

would disclose that Arthur Bennett did operate a taxicab, as is described and defined by Chapter 231 of the Laws of New Jersey, 1926, makes it impossible for the plaintiff to recover against this defendant upon a policy of insurance which is issued solely for the purpose of protecting the traveling public against the operation of taxicabs under an act which makes it obligatory for taxi owners to carry such liability insurance. Such a failure to declare these important allegations would not invalidate a judgment recovered against Arthur Bennett, for his liability arises by reason of the negligent operation *of a motor vehicle,* whereas the defendant insurance company's liability arises only by reason of the operation, ownership or maintenance of a taxicab by its insured and which is being operated, owned and maintained in accordance with the provisions of Chapter 231 of the Laws of New Jersey, 1926.

We therefore respectfully allege that there being a total failure of proof that Arthur Bennett was operating an autocab which is defined as a taxicab under the provisions of the statute and there being an absence of proof that such taxicab was being operated in the State of New Jersey and that the accident happened upon any streets in New Jersey, the defendant company can in no wise be liable upon the judgment which the plaintiffs have obtained.

It may be argued that the taxicab bore a New Jersey license number which is *prima facie* evidence that the taxicab was operated in New Jersey, but such an argument would be fallacious because an automobile with a New Jersey license plate may, through the courtesy established between the various states of the union, operate outside the State of New Jersey without requiring the procuring of license plates from such foreign state, and

if this accident occurred outside the State of New Jersey, the insurance company would not be liable to the traveling public upon a policy of insurance issued to the driver or owner of the taxicab because the statute protects only citizens of the State of New Jersey and it being a contract for the benefit of the traveling public, the benefits of the statutes can be applied only to the public traveling within the confines of the State of New Jersey.

POINT II.

The Court erred in denying the motion for a nonsuit and in the denial of defendant's motion to direct a verdict in its favor.

If our contention under Point I is sound, the Court erred in denying the defendant's motion for a nonsuit, for it is apparent that the plaintiff relied entirely upon the transcript of the pleadings upon which the former judgment was based in endeavoring to hold this defendant company liable. If the prior judgment is not based upon a liability for which the defendant company indemnifies the assured, there can be no recovery against this defendant. The Court therefore erred in denying the motion for a nonsuit.

But if the Court did not err in denying the motion for a nonsuit, at the close of the entire case a motion was made by the defendant to direct a verdict in favor of said defendant which the Court also denied. At the close of the entire case it became more apparent that the plaintiffs relied entirely upon the pleadings in the former trial in order to substantiate its verdict in this case. The motion, therefore, based upon the same grounds as was urged in the application for a nonsuit, should have been granted by directing a verdict in favor of the defendant.

It is to be noted in this case that the policy of insurance was the contract of indemnity between the insurance company and Arthur Bennett. Nothing in the policy indicates that the liability is to extend to his heirs, executors, administrators or assigns. After an order of reference was obtained for the assessment of damages, an order was taken substituting an administrator for the defendant in the original action. After the assessment of damages, the judgment was entered against the administrator.

The Legislature of our state has declared that where any testate or intestate shall in his lifetime have committed a trespass to person or property, such person, his or her executors or administrators shall have and maintain the same action against the executors or administrators of such testator or intestate as he, she or they might have had or maintained against such testator or intestate (2 Comp. Stat. 2260, Sec. 5).

We, of course, cannot deny that the plaintiffs could properly obtain a judgment against the administrator of Arthur Bennett, he having died pending the outcome of the litigation, but the policy of insurance does not indemnify Arthur Bennett or his administrators. It is a personal contract. We respectfully submit that this defendant cannot therefore be liable upon this judgment obtained against the administrator of its assured unless the Courts will construe a policy issued under Chapter 231 of the Laws of New Jersey, 1926, to be an indemnity for the benefit of the traveling public, irrespective of the death of the insured, upon the theory that the traveling public should not be denied the right of recovery against the insurance company in the event that the assured may have died before a judgment was obtained.

POINT III.

The liability of the insurance company is limited to $5,000.00.

The plaintiff in its pleadings in the present suit alleged that the defendant company's policy of insurance provided for the indemnity of $5,000.00 for injuries suffered by one person and $10,000.00 for injuries suffered by two persons. When the contract of insurance was admitted in evidence (Exhibit P-6), it disclosed that the liability of the defendant company was limited as follows (Case, p. 61):

> "The liability of the Company for loss from any one judgment resulting in bodily injuries to or in the death of any one person is limited to Five Thousand Dollars ($5,000.00), and there shall be a continuing liability of the Company for such amount under this policy, notwithstanding any recovery thereunder."

In this accident two persons were involved, a husband and wife. The wife obtained a verdict of $8,000.00 and the husband for $2,000.00. The trial court in this case construed the liability of the defendant company as an absolute liability of $5,000.00 for every person injured in an accident and upon that theory directed a verdict for the wife in the sum of $5,000.00, which is the limit of liability for one person, and in addition awarded a verdict in favor of the husband in the sum of $2,000.00, which would make a total liability of $7,000.00 against this company.

We respectfully submit that it was not the intention of the Legislature when it passed Chapter 231 of the Laws of New Jersey, 1926, nor does the contract of insurance provide that the defendant

company shall be liable to the extent of $5,000.00 for every person who may be injured in one accident. If that were so, a taxicab being operated under the provisions of this act, containing five passengers, if all were severely injured, the defendant company would be liable to the extent of $25,000.00 in one accident.

The language of the statute is as follows:

> "An insurance policy of a company duly licensed to transact business under the insurance laws of the State of New Jersey in the sum of five thousand dollars ($5,000) against loss from the liability imposed by law upon the auto cab owner for damages on account of bodily injury or death suffered by any person or persons as a result of *an* accident occurring by reason of the ownership, maintenance or use of such auto cab upon any public street, road or highway."

The policy of insurance also expressly limits the recovery in any one judgment to $5,000.00 as a result of bodily injuries or the death of any one person. The provision of the policy is as follows (Case, p. 61):

> "The liability of the Company for loss from any one judgment resulting in bodily injuries to or in the death of any one person is limited to Five Thousand Dollars ($5,000.00), and there shall be a continuing liability of the Company for such amount under this policy, notwithstanding any recovery thereunder."

It is therefore apparent that the Legislature was endeavoring to protect the traveling public to the extent of $5,000.00 for the injury of any person *or* persons as the result of *an* accident. Unless this construction is placed upon this act of the Legislature, we submit that no insurance company would issue any policies to taxicab owners if the

liability of such insurance company is unlimited and may be dependent upon the number of persons who may be ridiing in a taxicab at any one time. The Legislature has fixed $5,000 as the amount of liability which an insurance company may be directed to pay as the result of injury to any person *or* persons as the result of *an* accident. If the Legislature desired to impose a liability of more than $5,000 upon an insurance company, it would have clearly used language which would unambiguously denote that intent. Instead of that, the Legislature in no unmistakable terms provided that the policy must be in the sum of $5,000 against loss on account of bodily injuries suffered *by any person or persons as the result of an accident,* clearly indicating the intent to limit such liability to $5,000 as the result of an accident.

It was therefore error for the Court to have directed verdicts which would aggregate more than $5,000 for both of these defendants.

CONCLUSION.

It is respectfully submitted that the plaintiffs have no cause of action against this defendant company because there is no proof in any of the cases presented or in the pleadings upon which the judgments were obtained that there was involved in the collision an autocab or motor vehicle which was operated as a taxicab or possessed the characteristics of a taxicab under the provisions of Chapter 231 of the Laws of New Jersey, 1926, or that the accident occurred upon any of the streets of New Jersey, and in the absence of such proof, the defendant was entitled to a judgment of nonsuit or at the conclusion of the entire case to a direction of a verdict in its favor.

The judgment, therefore, which the plaintiffs recovered should be reversed and set aside.

The Court also erred in directing verdicts aggregating more than $5,000. It is apparent under and by virtue of the said Taxi Act the liability of the defendant company is limited to $5,000 in any one accident, and a direction of verdicts for more than that sum is erroneous.

Respectfully submitted,

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